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93-988

No. (1)

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

CLAIR W. BURKE,
Petitioner,

v.

DEERE & COMPANY, a/k/a JOHN DEERE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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65 pp

QUESTIONS PRESENTED

1. Whether the time for filing a notice of appeal under Fed. R. App. P. 4(a)(4) is tolled by a motion that refers to Fed. R. Civ. P. 59(e), but which is in substance a motion under Fed. R. Civ. P. 60(a).

2. Whether the "unique circumstances" exception of *Thompson v. INS*, 375 U.S. 384 (1964), should apply to permit appellate jurisdiction absent a timely notice of appeal in this case.

LIST OF PARTIES

Plaintiff-Appellee below was Clair W. Burke. Defendant-Appellant was Deere & Company, also known as the John Deere Company.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

FEDERAL RULES PROVISIONS INVOLVED 2

STATEMENT AND INTRODUCTION OF THE CASE 3

A. Factual Background 3

B. Proceedings Before The District Court And The Court of Appeals 4

REASONS FOR GRANTING THE PETITION 8

CONCLUSION 13

TABLE OF AUTHORITIES

CASES — Page

Alimenta (U.S.A.), Inc. v. Anheuser-Busch Cos., 803 F.2d 1160 (11th Cir. 1986) 8, 9

Browder v. Director, 434 U.S. 257 (1978) 9, 11

Christopherson v. Deere & Co., 941 F.2d 692 (8th Cir. 1991) 3

Jackson v. Schoemehl, 788 F.2d 1296 (8th Cir. 1986) 9

Lockley v. Deere & Co., 933 F.2d 1378 (8th Cir. 1991) 3

Martinez v. Sullivan, 874 F.2d 751 (10th Cir. 1989) 9

Miller v. Transamerican Press, Inc., 709 F.2d 524 (9th Cir. 1983) 8

Offshore Prod. Contractors, Inc. v. Republic Underwriters Ins. Co., 910 F.2d 224 (5th Cir. 1990) 8

Osterneck v. Ernst & Whinney, 489 U.S. 169 (1989) 12

St. Paul Fire & Marine Ins. Co. v. Continental Casualty Co., 684 F.2d 691 (10th Cir. 1982) 8, 9, 11

Thompson v. INS, 375 U.S. 384 (1964) 12

United States v. One Urban Lot, 882 F.2d 582 (1st Cir. 1989) 9

Western Indus., Inc. v. Newcor Canada Ltd., 709 F.2d 16 (7th Cir. 1983) 8, 9

Wheeler v. John Deere Co., 862 F.2d 1404 (10th Cir. 1988) 3

White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445 (1982) 10

FEDERAL RULES

Fed. R. App. P. 4(a)(1) 8

Fed. R. App. P. 4(a)(4) 8

Fed. R. Civ. P. 59(e) ..... *passim*

Fed. R. Civ. P. 60(a) ..... *passim*

OTHER AUTHORITIES

Charles W. Adams, *The Timing of Appeals under Rule 4(A)(4) of the Federal Rules of Appellate Procedure*, 123 F.R.D. 371 (1988) 8, 9

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

CLAIR W. BURKE,
Petitioner,

v.

DEERE & COMPANY, a/k/a JOHN DEERE COMPANY,
Respondent.

Petition for a Writ of Certiorari to
the United States Court of Appeals for
the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Clair W. Burke respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The order of the court of appeals denying the motion to dismiss the appeal is unreported and is included in the Appendix at p. 1a., and the order of the court of appeals denying reconsideration is included in the Appendix at p. 2a. The opinion

of the court of appeals is reported at 6 F.3d 497 (8th Cir. 1993), and is included in the Appendix at pp. 3a. - 44a. The order of the court of appeals denying rehearing is included in the Appendix at p. 45a. The decision of the district court on motions for judgment notwithstanding the verdict and for new trial is reported at 780 F. Supp. 1225 (S.D. Iowa 1991).

JURISDICTION

The judgment of the court of appeals was entered on August 13, 1993. Rehearing was denied on September 22, 1993. This Court has jurisdiction under 28 U.S.C. § 1254(1). Jurisdiction in the court of appeals was based upon 28 U.S.C. § 1291. The court of appeals denied Petitioner's motion to dismiss the appeal for lack of jurisdiction based on the untimely filing of the notice of appeal. This Petition seeks review of that ruling.

FEDERAL RULES PROVISIONS INVOLVED

Federal Rule of Appellate Procedure 4(a)(1) provides, in pertinent part:

> In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; . . . .

Federal Rule of Appellate Procedure 4(a)(4) provides, in pertinent part:

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party . . . under Rule 59 to alter or amend the judgment . . . the time for appeal for all

> parties shall run from the entry of the order . . . granting or denying . . . such motion.

Federal Rule of Civil Procedure 59 (e) provides:

> A motion to alter or amend the judgment should be served not later than 10 days after entry of the judgment.

Federal Rule of Civil Procedure 60(a) provides, in pertinent part:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

STATEMENT AND INTRODUCTION OF THE CASE

A. Factual Background

This products liability action was tried to a jury in November 1990. The only witness that Respondent Deere & Company ("Deere") presented in its defense was a retained expert. No Deere officer or employee appeared before the jury to defend Deere's product and explain its conduct. Deere is the world's largest manufacturer of agricultural machinery. The unsavory history of Deere's Titan series combine causing numerous amputations and other injuries is chronicled in various reported appellate opinions. *See, e.g., Christopherson v. Deere & Co.*, 941 F.2d 692 (8th Cir. 1991); *Lockley v. Deere & Co.*, 933 F.2d 1378 (8th Cir. 1991); *Wheeler v. John Deere Co.*, 862 F.2d 1404 (10th Cir. 1988). Clair W. Burke ("Burke") was injured by a Deere Titan series combine on November 9, 1984, three years

after Deere had determined that the combine design that caused Burke's injury was unsafe. Burke's injury was the twenty-fourth known injury caused by Deere's defective design of and failure to warn about the combine's auger and lower cleanout door. At the time of this trial, there had been twenty-nine such accidents reported to Deere, the latest accident having occurred in January 1990.

The jury returned a verdict for Burke and determined his compensatory damages to be $650,000. The jury found Burke 40% at fault and Deere 60% at fault, resulting in a $390,000 net recovery to Burke. The jury specifically found that Deere's conduct constituted a willful and wanton disregard for the rights or safety of others, and awarded $50 million in punitive damages. After carefully reviewing the jury's punitive damage award, the district court *sua sponte* remitted the award to $28 million, which represents 1% of Deere's $2.78 billion net worth. Burke accepted that remittitur.

B. Proceedings Before the District Court And The Court of Appeals

A judgment on the jury verdict was entered November 26, 1990. Deere filed motions for a new trial and judgment notwithstanding the verdict in December 1990. The district court denied the motion for judgment notwithstanding the verdict and denied the motion for new trial on the condition that Burke accept a remittitur. *Burke v. Deere & Co.*, 780 F. Supp. 1225 (S.D. Iowa 1991). Burke consented to the remittitur on December 23, 1991.

On January 9, 1992, the district court entered an order awarding Burke prejudgment interest from the filing of the action. An Amended Judgment was entered by the court clerk on

January 9, 1992. That Amended Judgment reflected Burke's consent to the remittitur and the award of prejudgment interest from September 15, 1986 to the date of the Amended Judgment.

On January 17, 1992, Burke filed a motion to amend the January 9, 1992 Amended Judgment in the following respects: (a) to show the punitive damage judgment to Burke to be $28 million rather than $7 million; (b) to specify November 26, 1990 as the date from which post-judgment interest was to run; and (c) to specify the rate of post-judgment interest. On February 18, 1992, the district court entered an order granting Burke's motion to amend the Amended Judgment. In that order, the district court found that post-judgment interest was to be calculated from November 26, 1990. On February 18, 1992, the court clerk entered a Second Amended Judgment pursuant to Fed. R. Civ. P. 58. That Second Amended Judgment reflected the district court's February 18, 1992 order, with the exception that the court clerk erroneously omitted the November 26, 1990 date set forth in the district court's order as the date from which post-judgment interest was to run.

On February 28, 1992, Burke filed a motion captioned "Plaintiff's Motion to Amend Second Amended Judgment of February 18, 1992." Although Burke cited Fed. R. Civ. P. 59(e), the motion expressly requested that the February 18, 1992 Second Amended Judgment entered by the court clerk be amended "to cause that judgment to agree with the court's order of February 18, 1992." The motion stated, "Contrary to [the February 18, 1992 order], the Second Amended Judgment fails to specify the correct date and rate upon which post-judgment interest pursuant to 28 U.S.C. § 1961 is to accrue." Burke did not ask the district court to address any substantive issue or reconsider any prior decision. Deere did not even respond to Burke's February 28, 1992 motion.

The district court entered an order on April 1, 1992, granting Burke's motion to amend the Second Amended Judgment. To correct the error arising from its prior omission of the November 26, 1990 post-judgment interest date, the court clerk entered a Third Amended Judgment on April 1, 1992. The Second Amended Judgment and the Third Amended Judgment, each entered by the court clerk pursuant to its ministerial duty under Rule 58, are set forth below. The difference between the two judgments is the insertion of the November 26, 1990 date. The Third Amended Judgment did not change the district court's prior disposition of the merits or any other issues raised in the case.

SECOND AMENDED JUDGMENT

IT IS ORDERED AND ADJUDGED that judgment is rendered in favor of the plaintiff, Clair W. Burke, for $390,000.00 actual damages plus interest at 10% per annum from and after September 15, 1986, until date of this order, and interest thereafter at a rate as provided by law pursuant to 28 U.S.C. § 1961.

IT IS FURTHER ORDERED that judgment is rendered against the defendant in the amount of $28,000,000 in punitive damages. Of this amount, $7,000,000, plus reasonable attorney fees and costs, are awarded to the plaintiff. The remaining balance is to be held in an interest bearing account by the Clerk of this Court until further order of this court.

IT IS FURTHER ORDERED that judgment be rendered in favor of the plaintiff for costs in this action in the amount of $9422.00, following the Order of the Clerk of Court entered January 9, 1992, denying the plaintiff's motion for additional costs.

Dated this 18th day of February, 1992.

THIRD AMENDED JUDGMENT

IT IS ORDERED AND ADJUDGED that judgment is rendered in favor of the plaintiff, Clair W. Burke, for $390,000 actual damages plus interest at 10% per annum from September 15, 1986, until November 26, 1990, and interest thereafter at the rate in effect November 26, 1990, as provided by law pursuant to 28 U.S.C. section 1961.

IT IS FURTHER ORDERED that judgment is rendered against the defendant in the amount of $28,000,000 in punitive damages plus interest from November 26, 1990, at the rate in effect November 26, 1990, as provided by law pursuant to 28 U.S.C. section 1961. Of this amount $7,000,000 plus reasonable attorney fees and costs, and post-judgment interest thereon, are awarded to the plaintiff. The remaining balance is to be held in an interest bearing account by the Clerk of this Court until further order of this Court.

IT IS FURTHER ORDERED that judgment be rendered in favor of the plaintiff for costs of this action of $9,422.00, to be entered as of November 26, 1990. All other requests for additional costs are denied.

April 1, 1992.

Deere filed its notice of appeal on April 29, 1992, more than thirty days after the Second Amended Judgment. Burke moved in the court of appeals to dismiss Deere's appeal because the notice of appeal was untimely under Fed. R. App. P. 4(a)(1). The court denied the motion on August 4, 1992, App. 1a., and also denied a subsequent motion for reconsideration on September 15, 1992, App. 2a.

The court of appeals entered its opinion reversing the district court's judgment on August 13, 1993. The August 13 opinion

was subsequently vacated and a new opinion was entered on August 27, 1993.

REASONS FOR GRANTING THE PETITION

1. The Eighth Circuit's decision denying the motion to dismiss the appeal conflicts with the decisions of other circuit courts which have found that motions referring to Rule 59(e) cannot toll the time for filing a notice of appeal when they are in substance motions under Rule 60(a). *E.g., Alimenta (U.S.A.), Inc. v. Anheuser-Busch Cos.*, 803 F.2d 1160, 1162-63 (11th Cir. 1986); *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 527 (9th Cir. 1983); *St. Paul Fire & Marine Ins. Co. v. Continental Casualty Co.*, 684 F.2d 691, 693-94 (10th Cir. 1982); *see also Offshore Prod. Contractors, Inc. v. Republic Underwriters Ins. Co.*, 910 F.2d 224, 229 (5th Cir. 1990) ("The mere fact that a court reenters a judgment or revises a judgment in an immaterial way does not affect the time within which litigants must pursue an appeal."). The thirty-day period of Fed. R. App. P. 4(a)(1) for filing a notice of appeal is tolled if any party files a timely motion under Fed. R. Civ. P. 59. Fed. R. App. P. 4(a)(4). A motion to correct a clerical mistake pursuant to Fed. R. Civ. P. 60(a) does not toll the thirty-day period.

This case thus raises what one circuit has referred to as "the recurrent -- one might also say incessant -- problem of distinguishing between motions" under Rules 59 and 60. *Western Indus., Inc. v. Newcor Canada Ltd.*, 709 F.2d 16, 16 (7th Cir. 1983). As one commentator has noted: "The difficulties that the seemingly straightforward paragraph [Fed. R. App. P. 4(a)(4)] has caused the appellate courts since its adoption in 1979 are shown by the large number of appellate decisions that have dealt with it." Charles W. Adams, *The Timing of Appeals under Rule*

4(A)(4) of the Federal Rules of Appellate Procedure, 123 F.R.D. 371, 372 (1988). The Court should grant the Petition to resolve this issue.

A number of circuits have stated an inclination toward finding that *any* post-trial motion, regardless of substance, filed within the ten-day period for filing a Rule 59(e) motion tolls the time for filing a notice of appeal. *E.g., United States v. One Urban Lot*, 882 F.2d 582, 584 (1st Cir. 1989); *Martinez v. Sullivan*, 874 F.2d 751, 753 (10th Cir. 1989); *Jackson v. Schoemehl*, 788 F.2d 1296, 1298 (8th Cir. 1986); *Western Indus., Inc. v. Newcor Canada Ltd.*, 709 F.2d 16, 17 (7th Cir. 1983). Because Burke's motion was in substance a Rule 60(a) motion that was filed within the ten-day period for filing a Rule 59(e) motion, the Eighth Circuit's order is consistent with the ten-day approach discussed in those cases and contrary to the substance of the motion. As with the circuit court that was reversed in *Browder v. Director*, 434 U.S. 257, 264 (1978), however, the Eighth Circuit here failed to elaborate its findings on appellate jurisdiction.

Simply because a motion refers to Rule 59 does not make it a Rule 59 motion that tolls the time for filing a notice of appeal. *E.g., Alimenta*, 803 F.2d at 1162-63. The substance of a motion must be evaluated when characterizing it for purposes of determining whether the motion tolls the time for filing a notice of appeal. *St. Paul Fire & Marine*, 684 F.2d at 692-93 (in determining whether motion tolls the time for appeal "the courts look beyond the form of the document to determine its substance"). Burke's February 28, 1992 motion to amend the Second Amended Judgment was in substance a motion seeking to correct the court clerk's oversight resulting in the clerk's Rule 58 judgment not reflecting the district court's February 18, 1992 order.

> Motions seeking mere technical changes in the form of a judgment are not Rule 59(e) motions and do not toll the time for filing notice of appeal; rather they are akin to Rule 60(a) motions to correct clerical errors in a judgment.

Id. at 693. "[T]he federal courts generally have invoked Rule 59(e) only to support reconsideration of matters properly encompassed in a decision on the merits." *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 451 (1982).

Burke's February 28, 1992 motion did not seek to have the district court determine whether prejudgment or post-judgment interest should be awarded, nor did it raise the issue of from what date interest was to run. Those issues had been raised previously by Burke, disputed by Deere, and resolved by the district court. Burke was not asking the district court to reconsider any issue previously decided. In reducing the district court's order to a judgment pursuant to Rule 58, the court clerk mistakenly omitted the November 26 date from which interest was to run. That clerical mistake was the subject matter of Burke's February 28, 1992 motion.

There is no better demonstration that Burke's motion was to correct a clerical mistake than the fact that it was unopposed by Deere. Deere did not oppose Burke's February 28, 1992 motion because the motion did not raise any issues related to the merits and did not ask the district court to reconsider matters previously decided. If the motion had concerned anything other than a clerical mistake, then it would have been opposed by Deere. Burke's motion was unopposed because it concerned solely the court clerk's ministerial duty to reduce to a "judgment" the district court's orders. Notwithstanding this acknowledgement of the nature of Burke's motion, Deere failed to file its notice of appeal within thirty days of the February 18, 1992 Second Amended Judgment.

In *St. Paul Fire & Marine*, a party filed a paper that in substance "sought only to have the judgment recite the essential terms of, or incorporate by reference, the [court's prior] Memorandum and Order." 684 F.2d at 894. The Tenth Circuit rejected the argument that this was a Rule 59(e) motion, and concluded that the thirty-day period for filing a notice of appeal had not been tolled. As with the filing at issue in *St. Paul Fire & Marine*, Burke's motion simply sought to have the Second Amended Judgment recite the November 26 date set forth in the district court's prior order.

In *Alimenta*, a party filed a motion styled "Rule 59" motion but which asked the district court to reconsider its decision requiring each party to bear its costs. 803 F.2d at 1162. Faced with the issue of whether the "Rule 59" motion stayed the period for filing a notice of appeal and therefore made the appellant's notice of appeal premature, the Eleventh Circuit looked beyond the Rule 59 labeling and evaluated the substance of the motion. Contrary to the labeling of the motion, the Eleventh Circuit concluded that it was not a Rule 59 motion. 803 F.2d at 1162-63. Burke's motion was not addressed to those matters encompassed by Rule 59, but instead was concerned with correcting a clerical mistake encompassed by Rule 60(a).

The Third Amended Judgment in this case did not materially revise the Second Amended Judgment or any prior decision or orders of the district court. The Third Amended Judgment simply inserted a date that the district court had previously determined was to be part of the judgment in the case. As a consequence, the time for filing the notice of appeal ran from the date of the Second Amended Judgment. The timely filing of a notice of appeal is mandatory and jurisdictional. *Browder v. Director*, 434 U.S. 257, 264 (1978). Accordingly, the court of appeals did not have jurisdiction over this case and the appeal

should have been dismissed. The Eighth Circuit's decision is inconsistent with the decisions of other circuits involving nominal Rule 59(e) motions that were in substance Rule 60(a) motions, and merits this Court's review.

2. This case also presents an issue regarding the "unique circumstances" exception established by the court in *Thompson v. INS*, 375 U.S. 384 (1964). Deere urged in the court of appeals that even if its notice of appeal was untimely filed the court of appeals nonetheless should have heard its appeal based on the rationale of *Thompson*. The Court's statement that "*Thompson* applies only where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done," demonstrates the limited nature of the *Thompson* exception. *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 179 (1989). Any reliance on the "unique circumstances" exception here was thus improper, inasmuch as Deere never sought or received specific assurances that its appeal was timely filed. *See Osterneck*, 489 U.S. at 179.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 1993

APPENDICES

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 92-1990SICB Clair W. Burke Plaintiff-Appellee vs. Deere & Company, etc. Defendant-Appellant	Appeal from the United States District Court for the Southern District of Iowa

Appellee's motion to dismiss the appeal has been considered by the Court and is hereby denied.

August 4, 1992

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 92-1990SICB

Clair W. Burke
Plaintiff-Appellee

vs.

Deere & Company, etc.
Defendant-Appellant

Appeal from the United States District Court for the Southern District of Iowa

Appellee's suggestion for reconsideration en banc of the order of August 4, 1992 is denied. Appellee's motion for reconsideration is also denied.

September 15, 1992

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

AMENDED

No. 92-1990

Clair W. Burke,
Appellee,

vs.

Deere & Company, a/k/a
John Deere Company, a
Delaware Corporation,
Appellant.

Appeal from the United States
District Court for the
Southern District of Iowa

Submitted: December 17, 1992
Filed: August 27, 1993

Before MAGILL, Circuit Judge, HEANEY, Senior Circuit Judge, and BEAM, Circuit Judge.

BEAM, Circuit Judge.

This is a products liability case tried in federal court under diversity jurisdiction. The jury awarded plaintiff, Clair W. Burke, $650,000 for compensatory damages, and $50,000,000 for punitive damages. The compensatory damages were reduced to $390,000 under a finding of comparative fault and the punitive damages were reduced to $28,000,000 through a district court order of remittitur. Deere & Company (Deere) appeals citing numerous trial errors. We reverse.

I. BACKGROUND

This case is governed by Iowa law. The issues, though

significant, should have been relatively uncomplicated. Unfortunately, the litigation went awry due to confusion about various theories of recovery and defense and the admissibility and use of evidence under these theories. The facts are set forth in the district court's order on Deere's motion for judgment notwithstanding the verdict, for new trial or for remittitur. *Burke v. Deere & Co.*, 780 F. Supp. 1225, 1230-34 (S.D. Iowa 1991). We will repeat them only as necessary for our discussion.

Burke was injured on November 13, 1984, when a vertical auger on a model 6620 John Deere Titan Series Combine cut his right hand. Mark Goranson, Burke's employer had purchased the combine new in 1979. Burke's injury occurred when he reached through a clean-out door in the vertical auger's housing to remove debris in the grain delivery system while preparing the combine for transfer to Deere's dealer for a design modification of the clean-out door. Goranson had turned on the auger from the operator's cab just before or just after Burke placed his hand in the combine.

At trial, the district court permitted Burke to present evidence of other accidents involving the Titan series combine and admitted evidence of post-sale and post-accident acts by Deere and its dealers. Some of the evidence showed that Deere implemented both a decal program and, later, a field-modification program after receiving several reports of injuries involving the auger. The district court submitted the issue of punitive damages to the jury.

Deere assigns error to numerous evidentiary rulings and instructions. Deere contends that: (1) the district court's admission of evidence of other accidents and evidence of post-sale conduct by Deere resulted in unfair prejudice; (2) Jury Instruction 36 erroneously instructed the jury that Iowa law imposes a continuing duty to modify or to retrofit; (3) the district court erred in

submitting the punitive damages issue to the jury; (4) the punitive damages award is unconstitutional; (5) the verdict form was improper and unduly prejudicial to its case; and (6) the district court erred by permitting argument which informed the jury that a portion of any punitive damages award would be paid into a civil reparations trust fund administered by the district court.[1]

II. DISCUSSION

A. Overview--Theory of the Case

Before further discussing the details of this case, we find it necessary to analyze the issues framed by the pleadings and Iowa law applicable to the theories of recovery and defense. In his complaint, Burke alleged that "[a]s designed, made and sold, the machine [combine] was defective and unreasonably dangerous and was a trap and a snare to the user." Appellant's appendix at 17. There were no allegations of negligent conduct on the part of Deere.

The complaint further alleged: "Deere acted wantonly, with gross disregard for plaintiff's safety and the safety of other users and plaintiff is entitled to punitive damages." *Id.* While that sentence could be construed to include an allegation of "negligent" acts by Deere, plaintiff's counsel stated at the instruction conference that "[t]his isn't a negligence case." Transcript at 2331. Later plaintiff's counsel said "plaintiff generally claims

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[1]Under Iowa Code § 668A, when punitive damages are awarded, the court must ask the jury whether the defendant's conduct was directed specifically at the plaintiff. If the jury answers in the negative, seventy-five percent of the award is paid into a civil reparations trust fund. *See infra* at 17a n.13. In this case the jury determined by special interrogatory that Deere's conduct was not directed specifically at Burke.

that the product is defective and unreasonably dangerous." Transcript at 2372. These statements, coupled with counsel's still later statement that "we haven't amended our complaint," transcript at 2384, establish that the plaintiff's only substantive theory of recovery in this case was strict liability in tort under Restatement (Second) of Torts § 402A (1965) (Restatement).[2]

The Iowa Supreme Court adopted section 402A of the Restatement in *Hawkeye-Security Ins. Co. v. Ford Motor Co.*, 174 N.W.2d 672, 684 (Iowa 1970). In a series of cases after *Hawkeye-Security*, including, particularly, *Hughes v. Magic Chef, Inc.*, 288 N.W.2d 542 (Iowa 1980), and *Fell v. Kewanee Farm Equip. Co.*, 457 N.W.2d 911 (Iowa 1990), the Iowa Supreme Court established the elements of the strict liability theory and applicable defenses. For purposes of this case, Iowa Civil Jury Instruction 1000.1 adequately sets forth the elements of a claim under a strict products liability theory.[3] The requirement

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[2]We have searched the record and find no motion to conform the pleadings to evidence on theories of recovery other than those raised in the complaint. *See* Fed. R. Civ. P. 15(b). The record is replete, however, with objections by defendant to evidence proffered by plaintiff on matters not relevant to a strict liability cause of action.

[3]Iowa Pattern Jury Instruction 1000.1 provides:

1000.1 Essentials for Recovery. In order to recover on the claim of strict liability, the plaintiff must prove all of the following propostions:

1. The defendant [designed] [manufactured] [assembled] [sold] (product).

2. The defendant was engaged in the business of [designing] [manufacturing] [assembling] [selling] (product).

3. The (product) was in a defective condition at the time it left defendant's control in one or more of the following ways:
(Set out particulars as supported by the evidence.)

4. The defective condition was unreasonably dangerous to the plaintiff.

5. The plaintiff used the (product) in the intended manner or in a manner reasonably foreseeable by defendant.

6. The (product) was expected to and did reach the plaintiff without substantial change in its condition.

7. The defect was a proximate cause of plaintiff's damage.

8. The amount of damage.

that the plaintiff prove the product was dangerously defective when it left defendant's control is particularly important in this case. *See* Iowa Civil Jury Instruction 1001.1(3). The combine at issue here probably left Deere's control at the time of sale. It had clearly left Deere's control at the time the decal retrofit program was completed.

As stated, the only theory upon which the case was tried was strict liability in tort. There were, as also stated, no allegations of negligence-specifically, there were no allegations involving a negligent failure to warn. Had such a claim been made, Iowa law on that theory, including Restatement (Second) of Torts § 388, may have been implicated.[4] While the negligence and strict liability theories seem to merge in a case alleging that a product is defective because of inadequate warning, *see, e.g., Nassif v. National Presto Indus., Inc.*, 731 F. Supp. 1422, 1424 (S.D. Iowa

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> If the plaintiff has failed to prove any of these propositions, the plaintiff is not entitled to damages. If the plaintiff has proved all of these propositions, the plaintiff is entitled to damages in some amount. [If an affirmative defense is submitted, delete the second sentence and insert the following: If the plaintiff has proved all of these propositions, then you will consider the defense of _____ as explained in Instruction No. _____ .]

Iowa Civil Jury Instruction 1000.1 (Iowa State Bar Ass'n 1991) (footnote omitted).

[4]Section 388 of the Restatement Second of Torts provides:

> One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier
>
> (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and
>
> (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
>
> (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

Restatement (Second) of Torts § 388 (1965).

1990), important distinctions remain. Liability for defective design and manufacture relates to conditions existing *at the time the product leaves the seller's control.* Restatement § 402A cmt. g (1965); *Hawkeye-Security*, 174 N.W.2d at 684; *see also Hale v. Firestone Tire & Rubber Co.*, 756 F.2d 1322, 1336 (8th Cir. 1985) (under Missouri law evidence of post-sale knowledge of a defect may not be the basis for punitive damages based on inadequate warning in strict liability).

In a case alleging negligent failure to warn, on the other hand, there may be a continuing duty to warn of dangers which become known after the product has entered the stream of commerce. *See, e.g.*, Iowa Code § 668.12 (the state-of-the-art defense does not diminish duty to warn concerning subsequently acquired knowledge of a defect). As Deere correctly notes, the issue of inadequate warning was a "red herring" which confused the issues, evidence and burdens of proof in this case.[5] This does not mean, however, that the issue of warnings or cautions falls out of this lawsuit.

It is undisputed that when the combine was manufactured and sold Deere provided no specific warnings or cautions concerning the dangers inherent in the auger clean-out system. The combine was fitted at the time of delivery, however, with a general warning decal that stated: "CAUTION. 1) Keep all shields in place. 2) Disengage and shut off all engine power and/

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[5]This blurring of the two legal theories, and the concomitant misapplication and expansion of the law regarding any continuing duties in the failure to warn area, led, we believe, to the improper imposition of a duty to retrofit, as discussed *infra*. In spite of our discussion of ***Restatement of Torts*** Section 388, a theory of negligent failure to warn would have been very problematic under the facts of this action. Burke does not contend that he was not warned, he admits that he saw a warning decal within a few inches of the clean-out door. He does not contend that a further or different warning would have caused him to avoid the auger, he was warned to keep his hand out of the housing and he knew from previous experience that danger lurked inside. Burke's contention was that because of the mechanical design of the combine, the machine was dangerously defective for use by human beings whatever warnings were given.

or motor power before servicing or unclogging machine. 3) Keep hands, feet, and clothing away from power driven parts." This decal was located at eye level on a toolbox twenty-six inches from the auger clean-out door. Burke testified that, prior to the accident, he had read and understood this warning, transcript at 1517-18, and had read a similar but more extensive warning in the operator's manual. Transcript at 1505. Between the time of sale and the accident, Deere began to receive reports of injuries resulting from contact with the vertical auger. Indeed, there were enough incidents that Deere instigated a "decal" program whereby additional warning or caution decals were prepared and distributed to owners of the Titan combine. The retrofit decals were to be placed directly on the grain clean-out housing. This warning retrofit program seems to have created confusion on the part of the parties and the court as they attempted to formulate jury instructions at the end of the trial.

In order to establish his strict liability claim, Burke had to establish: 1) that the product had a defect and was unreasonably dangerous at the time it left Deere's hands; 2) that the dangerous defect caused the injury; and 3) damages. *See, e.g., Fell*, 457 N.W.2d at 916. A plaintiff who does not prove all of these elements is not entitled to recovery. The district court instructed the jury that the time of sale was the focal point in the defect inquiry. *See* Appellee's Appendix at 15, Jury Instruction 10. This may have been incorrect given the decal retrofit program.

The combine was sold, as indicated, without specific auger clean-out cautions. After the sale but prior to the accident, it is arguable that control of the combine was, at least constructively, returned to Deere so that the decal warning program could be completed.[6] Although these warnings did not modify the

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[6]It was stipulated that the decal retrofit occurred in early 1981. Although Goranson denied receiving the auger clean-out warning decal, the parties stipulated

mechanical design of the combine, they addressed or could serve to negate the "unreasonably dangerous" element of the products claim as outlined in Iowa Civil Jury Instruction 1000.1(4). *See* Restatement § 402A cmt. j. ("In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning.") This warning retrofit, in essence, was intended to replace the combine in Goranson's hands with a modified design of the grain delivery system. In our view, this point in time, which was several years prior to the date of the accident, was the proper focus for the defect inquiry.

The jury was instructed that "[i]f you find a warning was necessary and find that the caution decal over the toolbox was inadequate, either because of its placement or its wording, or that the danger of severe injury at the lower clean-out door was so great that no such caution decal would cure the danger or that the caution could not be followed, then you may find that the product was defective and unreasonably dangerous." Jury Instruction 14. Appellee's Appendix at 19. Contrary to Deere's assertion, the giving of this instruction does not mean that the court submitted the theory of negligent failure to warn to the jury. This instruction was, nonetheless, wrong.

This instruction permitted the jury to find that the product was defective and unreasonably dangerous by reason of inadequate decal warning alone. The evidence does not support such a finding. Burke never contended or argued that a proper warning would have prevented his accident. His theory was adequately set forth in the second clause of Instruction 14-that "the danger of severe injury at the lower clean-out door was so great that no such caution decal would cure the danger or that the

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that Deere mailed them, along with an accompanying letter, on April 12, 1981, to all customers who had purchased Titan combines prior to January, 1981. This would have included Goranson.

caution could not be followed, [if found], then you may find that the product was defective and unreasonably dangerous."

Under Iowa law a product must be both "in a defective condition" and in this condition "unreasonably dangerous" to the plaintiff. *Patterson v. F.W. Woolworth Co.*, 786 F.2d 874, 878 (8th Cir. 1986); Iowa Civil Jury Instruction 1001.1(3) and (4). In determining *unreasonable danger*, Deere was entitled to have the jury consider all the warnings given to Burke as well as his general knowledge and experience. Restatement § 402A cmt. j. In addition to the written warnings on the toolbox, there was evidence that Goranson had recently warned Burke not to place his hand inside the auger housing. Also, Burke testified that he had read the warnings in the operator's manual, that he was experienced with farm machinery and that he knew the general dangers that exist with regard to sudden movement of augers and the machinery parts. Instruction 14 did not give the jury any option to consider these additional matters.[7] We agree with the district court that, subject to consideration of these warnings and this knowledge and experience, the jury was

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[7]The dissent, *infra* at 34a, cites *LaCoste v. Ford Motor Co.*, 322 N.W.2d 898, 900 (Iowa Ct. App. 1982) (per curiam), a truck transmission case, for the proposition that an "[i]nadequate warning may in fact *be* the product defect under Iowa law." (emphasis in original). The dissent also states that Deere "misleads the court" with its "open and obvious" danger argument, and contends, in faulting our criticism of Instruction 14, that the propensity for misuse of the combine to create "two-person" accidents was not open and obvious and that "it is ludicrous for Deere to have so suggested."

We have no dispute with the premise that an inadequate warning may be the defect and that such defect may make the product unreasonably dangerous. This, however, was not Burke's theory. Since the combine had the decal warning and he otherwise had notice of the danger, his contention was that the mechanical design of the combine made it dangerously defective, whatever warning was given. This was not a case of a truck transmission creeping into reverse without warning when not solidly placed in the parking mode, as in *LaCoste*. As we point out, there was evidence that Burke knew the dangers of sudden movement of augers on farm machinery, that you should never place your hand inside an auger housing, that the clean-out operation was to ready the combine for a factory safety retrofit and that the other

entitled to ponder whether the combine was defective and unreasonably dangerous at relevant times. This inquiry, of course, would not necessarily end the case.

Proof of a plaintiff's conduct may also be used to attack the "proximate cause" element of a strict liability claim as described in Iowa Civil Jury Instruction 1001.1(7). Deere's allegation of "negligence" on the part of Burke was such an assault. In other words, Deere claimed that it was not a defect in the machine that caused Burke's injury but rather Burke's own negligence. Burke's alleged negligence involved the warnings received by Burke, from his employer, from the operator's manual and from the decal, as well as his general knowledge of the dangers involved in the work being done. A complete severance of the connection between the defect and injury would bar recovery.

Assuming, however, that the jury found both a defect that made the machine unreasonably dangerous and a causal link between the dangerous defect and Burke's injury, the inquiry is still not at an end. Deere alleged "assumption of risk" as an affirmative defense. The Iowa legislature has enacted a comparative fault statute, Iowa Code § 668 (1985). The Iowa Supreme Court eliminated "contributory negligence" as a bar to the recovery of damages arising as a result of a defect in a product. *Hughes*, 288 N.W.2d at 544. The form of contributory negligence by the plaintiff which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of *assumption of risk*, however,

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person working with Burke, his employer, Goranson, had just warned him not to place his hand inside the auger housing. It is difficult to envision a situation in which the propensity for misuse was more open and obvious. The jury finding that Burke was guilty of "assumption of risk", as later defined, through the forty percent holding of comparative fault, *supra* at 3a, indicates that the jurors also thought the defect was "open and obvious". The jury instructions cited by the dissent, numbers 12, 19, 24, 25, 26 and 27, do not attenuate the misleading focus of Instruction 14.

has been retained as a theory of comparative fault which may bar or diminish plaintiff's recovery under section 402A. *Id. See also Coker v. Abell-Howe Co.*, 491 N.W.2d 143, 147 (Iowa 1992) (assumption of risk remains a defense in those actions in which contributory negligence is not available, such as strict liability). The elements of this defense are set forth in Iowa Civil Jury Instruction 1000.9.[8] This defense also involves the warning. Establishment of this defense does not, however, totally foreclose recovery by Burke. It requires a comparison of fault on the part of Burke and Deere under the Comparative Fault statute. Iowa Code §§ 668.1-668.14. Thus, the warning issue is relevant to the existence of a dangerous defect, to causation, to Deere's affirmative defense of assumption of risk and to the assessment of comparative fault.

B. Admissibility of Post-Sale Accidents and Conduct

With this background in mind, we turn to the contested evidence adduced at trial. The district court admitted, over

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[8]That pattern jury instruction provides:

1000.9 Assumption of Risk. The defendant claims the plaintiff voluntarily assumed the risk by:

(*Set out the particulars supported by the evidence.*)

To prove this defense, the defendant must prove each of the following propositions:

1. The plaintiff knew the [defect] [dangerous condition] was present.
2. The plaintiff understood the nature of the danger to [himself] [herself].
3. Nevertheless, the plaintiff unreasonably, freely and voluntarily used the product.
4. The plaintiff's assumption of risk was a proximate cause of plaintiff's damage.

If the defendant fails to prove any of these propositions, the defendant has not proved this defense. If the defendant has proved all of these propositions, then you will include this fault in the total percentage of plaintiff's fault you find in accordance with the special verdict submitted with these instructions.

Iowa Civil Jury Instruction 1000.9 (Iowa State Bar Ass'n 1991).

Deere's objection, evidence of other post-sale, post-decal modification accidents involving the Titan series combine.[9] Deere asserts that this evidence was irrelevant because it related to events which occurred years after it relinquished control and was not therefore related to Deere's liability. Evidence of other accidents is admissible if the proponent of the evidence demonstrates that the accidents occurred under circumstances substantially similar to those at issue in the case at bar. *Hale*, 756 F.2d at 1332. There is no dispute that a proper foundation for the evidence was laid in this case. Under Fed. R. Evid. 401, evidence of similar occurrences may be relevant to the defendant's notice of a defect, the magnitude of the danger involved, the defendant's ability to correct a known defect, the lack of safety for intended uses, the standard of care, or causation. *Kehm v. Procter & Gamble Mfg. Co.*, 724 F.2d 613, 625 (8th Cir. 1983). Here, several of the uses mentioned in *Kehm* were not at issue and Deere was willing to stipulate to both notice of other accidents and feasibility of subsequent design changes. Accordingly, it was proper to admit evidence of other post-control accidents only on the issues of defect, causation and foreseeability of use or misuse of the product.

The evidence of other accidents was used by the plaintiff and the district court, however, in submission of the question of punitive damages to the jury. The court used a verdict form which told the jury that a portion of the punitive award would go to a trust fund. In his closing argument, Burke intimated that part of the award would compensate victims of similar farm-implement accidents. This use of evidence of other post-control

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[9]Deere asserts that the testimony of other accident victims, if admitted at all, should have been admitted only by way of deposition because live testimony by amputees was unduly prejudicial. We rejected this argument in *Lockley*, and reject it here. *Lockley v. Deere & Co.*, 933 F.2d 1378, 1386 n.9 (8th Cir. 1991).

accidents served to enhance the award of punitive damages. This was reversible error.

Deere next asserts that the district court erroneously admitted evidence of subsequent remedial measures by Deere. This evidence related to the timing and effectiveness of Deere's field modification program and included evidence that unmodified Titan series combines were sold as late as 1988 and were seen on dealer lots in 1990.[10] There was also extensive evidence that 3100 of the Titan series combines, which were in the distribution "pipeline" at the time of a factory design change in 1982, were not modified.

It is the law of this circuit that Rule 407 of the Federal Rules of Evidence, which prohibits the introduction of subsequent remedial measures to demonstrate the negligence or culpable conduct of the defendant, does not preclude the introduction of such evidence in strict liability cases.[11] *Donahue v. Phillips Petroleum Co.*, 866 F.2d 1008, 1013 (8th Cir. 1989). *See also Unterburger v. Snow Co.*, 630 F.2d 599, 603 (8th Cir. 1980);

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[10]Deere also contends that this evidence involves acts by dealers over which Deere has no control and that there has been no showing of agency so as to impute their actions to Deere. We need not reach this issue in light of our holding on the relevance of the evidence.

[11]Deere urges that we abandon this minority position and join our sister circuits who hold that such evidence is not admissible. *See, e.g., Raymond v. Raymond Co.*, 938 F.2d 1518, 1522-23 (1st Cir. 1991); *Chase v. General Motors Corp.*, 856 F.2d 17, 22 (4th Cir. 1988); *Gauthier v. AMF, Inc.*, 788 F.2d 634, 637, *amended*, 805 F.2d 337 (9th Cir. 1986); *Flaminio v. Honda Motor Co.*, 733 F.2d 463, 469 (7th Cir. 1984); *Grenada Steel Indus., Inc. v. Alabama Oxygen Co.*, 695 F.2d 883, 888 (5th Cir. 1983); *Hall v. American Steamship Co.*, 688 F.2d 1062, 1066-67 (6th cir. 1982); *Josephs v. Harris Corp.*, 677 F.2d 985, 990-91 (3d Cir. 1982); and *Cann v. Ford Motor Co.*, 658 F.2d 54, 60 (2d Cir. 1981), *cert. denied*, 456 U.S. 960 (1982). A panel of this court is without authority to modify the standard established in this circuit. *United States v. Lewellyn*, 723 F.2d 615, 616 (8th Cir. 1983). Only the court *en banc* is empowered to change an existing rule of law. *Id.* We note, however, that this case illustrates the dangers inherent in our present approach and further note that it may indeed be wise to revisit the issue *en banc* in a proper case.

Robbins v. Farmers Union Grain Terminal Ass'n, 552 F.2d 788, 793 (8th Cir. 1977). These cases hold that Rule 407 does not apply in strict liability cases, where by definition, negligence is not an issue. *Kehm*, 724 F.2d at 621. Thus, the existence and substance of the decal program and the factory and field modification programs are evidence of subsequent remedial measures which are relevant to the strict liability issue. *Lockley v. Deere & Co.*, 933 F.2d 1378, 1386 & n.10 (8th Cir. 1991). This proof relates, however, only to the existence of a dangerous defect in the product, and is not in any way relevant to the issue of damages.

Here, the retrofit evidence was admitted as ostensibly relevant to Deere's state of mind relating to imposition of punitive damages. Punitive damages cannot be awarded as a separate theory of recovery. Under Iowa law, punitive damages are merely incidental to the main cause of action and they are derived from the underlying cause of action. *Campbell v. Van Roekel*, 347 N.W.2d 406, 410 (Iowa 1984). In this case, as we have indicated, the underlying cause of action was strict liability in tort under section 402A of the Restatement. Accordingly, with one exception,[12] any evidence admissible on the issue of punitive damages must also have been admissible under the strict liability theory. Because any "bad conduct" by Deere for which punitive damages might be assessed must have occurred at or before the time Deere sold or attempted to retrofit the combine with the warning decal, the evidence of post-retrofit conduct was wholly irrelevant to the punitive damages issue.

We do not believe that the Iowa statute on punitive and

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[12]The exception would be information on the wealth or net worth of the defendant. This evidence is irrelevant to the issue of compensatory damages under any theory advanced.

exemplary damages, Iowa Code § 668A.1 (1987), changes this analysis.[13] That statute creates a "civil reparations trust". Seventy-five percent of any punitive damages award is paid into this fund if, in answer to a special interrogatory, the jury finds from the properly admitted evidence that "the conduct of the defendant *from which the claim arose* constituted willful and wanton disregard for the rights and safety of another [other than the claimant]." Section 668A.1(a) (emphasis added). We find nothing in the statute or its legislative history that provides a claimant

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[13]The statute, in effect at the time of this action, states:

668A.1 Punitive or exemplary damages.

1. In a trial of a claim involving the request for punitive or exemplary damages, the court shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating all of the following:

a. Whether the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of another.

b. Whether the conduct of the defendant was directed specifically at the claimant, or at the person from which the claimant's claim is derived.

2. An award for punitive or exemplary damages shall not be made unless the answer or finding pursuant to subsection 1, paragraph "a", is affirmative. If such answer or finding is affirmative, the jury, or court if there is no jury, shall fix the amount of punitive or exemplary damages to be awarded, and such damages shall be ordered paid as follows:

a. If the answer or finding purusant to subsection 1, paragraph "b", is affirmative, the full amount of the punitive or exemplary damages awarded shall be paid to the claimant.

b. If the answer or finding pursuant to subsection 1, paragraph "b", is negative, after payment of all applicable costs and fees, an amount not to exceed twenty-five percent of the punitive or exemplary damages awarded may be ordered paid to the claimant, with the remainder of the award to be ordered paid into a civil reparations trust fund administered by the state court administrator. Funds placed in the civil reparations trust shall be under the control and supervision of the executive counsel, and shall be disbursed only for purposes of indigent civil litigation programs or insurance assistance programs.

3. The mere allegation or assertion of a claim for punitive damages shall not form the basis for discovery of the wealth or ability to respond in damages on behalf of the party from whom punitive damages are claimed until such time as the claimant has established that sufficient admissible evidence exists to support a prima facie case establishing the requirements of subsection 1, paragraph "a".

Iowa Code § 668A.1 (1987).

seeking punitive damages a roving commission to offer evidence of culpable conduct on the part of a defendant occurring subsequent to the date of relinquishing control of the product in a design defect case. [14] Under the circumstances, we find that the district court abused its discretion in admitting the bulk of the evidence concerning subsequent remedial measures.[15]

The dissent asserts that we have no basis for our observation that "retrofit evidence was admitted as ostensibly relevant to Deere's state of mind relating to imposition of punitive damages." *Infra* at 42a. The dissent further cites the district court's statements in rulings on post-trial motions for the proposition that all "post-sale and post-accident" conduct was received only for impeachment purposes. Such contentions by the dissent are at odds with the trial record.

Colloquy between counsel and the court concerning post-accident injuries and post-accident retrofit activity, as related to punitive damages, extends over more than 1,000 pages of the record. And, as we have earlier stated, the cut-off time for such evidence for punitive damages purposes should have been at the time of sale or the time of the attempted decal retrofit.

On the first day of trial, Burke proposed evidence on post-accident retrofit activities as proof of punitive damages. Transcript at 26. On the second day of trial Burke proposed a series of post-accident witnesses as proof of "willful and wanton conduct on the part of Deere." Transcript at 121. Discussion of Burke's

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[14]The improper admission and use of this evidence also caused undue prejudice as it related to the erroneous imposition, as discussed *infra*, of liability under a theory of negligent failure to recall.

[15]On remand, the district court may admit limited evidence of subsequent remedial measures to show the existence of a defect. Evidence that relates to the imposition of punitive damages--including the timing of subsequent measures, numbers of machines retrofitted or not retrofitted, economics of field modification program, machines in field, pipeline or not yet manufactured--should not be received.

contention that this evidence was proof of Deere's "state of mind" in support of punitive damages continued over almost the entire time Burke offered evidence in his case-in-chief. Transcript at 57, 65, 73, 81, 121, 122, 131, 141, 143, 148, 269, 276, and 440. Deere continuously objected to the admissibility of this evidence. Transcript at 55, 129, 142, 144, 260, 271, 414, 440, 588, 641, 712, and 716. The district court overruled some of Deere's objections, Transcript at 58, 65, 81, 149, 173, and 338 and reserved ruling on other objections, Transcript at 339, 589, 893, and 1080, but permitted the jury to hear evidence on post-sale, post-decal program and post-accident retrofit activities and post-sale, post-decal program and post-accident injuries to third parties. Transcript at 342-69, 881-82, and 916-17. On the fifth day of trial, the district court stated:
Transcript at 1192-93; and 1195. The district court then permitted

> We then have the problem, if that is the situation of punitive damages are going to be given, that we have to talk about and make a ruling up or down on matters that have been, for want of better designation, called alleged bad acts of Deere after the day of the Burke injury which is November the 13th, I believe, of 1984.
>
> There's been a proffer of some things and some other arguments about it and what it ought to be and so forth, and the Court has been asking for and working with the lawyers in this regard all week long, and I had my crew working on it, and I'm persuaded now that it's not a subsequent remedial measure situation under 407, but it's more like a 404(b) question.
>
> And as you all know, 404(b) says, in pertinent part, that "other crimes, wrongs, or acts" -- "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan,

knowledge, identity, or absence or mistake or accident.

* * *

> Now, the situation kind of boils down to this: The critical time in relation to Deere's frame of mind is certainly at the time of the accident of Burke.[16] Engaging that frame of mind, realizing it has to be in '84, the question is whether subsequent conduct is properly admissible in helping the jury to determine if Deere's conduct at the time of Burke's injury was committed with a willful or reckless disregard to the rights of another. . . . But it's going to be the ruling of the Court, I believe, although as I said I'm going to hear you out at 10 after 1:00, that the matter of later bad acts of Deere after the Burke injury will be allowed to be presented to the jury after the jury is told that the critical time is Deere's frame of mind at the time of the accident of Burke but that in order to gauge that they may consider some subsequent conduct.

testimony on other post-sale, post-decal program and post-accident activities and injuries. Transcript at 1218-20, 1230-36, and 1559-76.

Thus, post-accident evidence of incidents of retrofit and injury occurring as late as 1990, some incidents involving combines purchased after prior use,[17] was indeed received as substantive proof of Deere's state of mind as it related to punitive damages. There is no indication whatsoever in the record that this evidence was admittted for impeachment purposes only.[18]

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[16]This was an erroneous conclusion. As we have stated, with no duty in Iowa to recall or to recall and retrofit, under a section 402A theory, the critical time was no later than the Deere decal retrofit effort that occurred in early 1981.

[17]There are indications in the record, Transcript at 127, that one 1990 injury offered in evidence occurred with a used combine upon which the original owner had refused modifications.

In fact, this evidence was received before Deere had the opportunity to offer evidence of any kind. Thus, there were no evidentiary presentations by Deere to be impeached at these times in the trial. There was no limiting instruction that told the jury that the "critical time [was] Deere's frame of mind at the time of the accident to Burke" as outlined by the court in its ruling or that otherwise limited the use of this evidence by the jury.

C. Jury Instruction 36--Duty to Retrofit

Because it was an issue which, in conjunction with improperly admitted evidence and incorrect jury instructions, further confused the issues in this case, we consider the duty, if any, in Iowa, to redesign and retrofit a product. Although such a duty may exist in some jurisdictions, we find nothing to indicate that an independent cause of action exists in Iowa under a duty to redesign and/or retrofit.[19]

At trial Deere vehemently objected to Instruction 36, which states:

> The legal basis for punitive damages is established in product liability cases where the manufacturer is shown to have knowledge that its product is inherently dangerous to persons or property and that its continued use is likely to cause injury or death, but nevertheless continues to market the product without making timely feasible modifications to eliminate

Appellee's Appendix at 43. Deere asserts that this instruction is

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[18]There was discussion at trial regarding whether impeachment might be an alternative basis for admission of some of this evidence. Transcript at 888, 894. The district court apparently abandoned this rationale in making the ruling quoted above.

[19]In any event, no such theory of recovery was advanced by the pleadings in this case.

> the danger or make adequate disclosure and warning of such danger.

not supported by Iowa law and that it effectively imposes a duty to retrofit upon Deere.[20]

We agree that the instruction was erroneous under the evidence in this case. As support for the instruction, Burke relies on *Fell*, 457 N.W.2d at 919. We presume, for purposes of discussion, that Instruction 36 reflects Iowa law. However, the language used in the instruction is only a portion of a larger discussion mentioned by the Iowa Supreme Court in its reference to a definition of "willful and wanton" conduct "tailor[ed]" for use in certain products liability cases by the Florida Appeals Court. *Id.* at 919 (citing *Johns-Manville Sales Corp. v. Janssens*, 463 So. 2d 242, 249 (Fla. Dist. Ct. App. 1984)).[21] The fact that the statement in *Fell* may be a proper reflection of Iowa law and may be a proper instruction in the particular products case does

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[20]Burke asserts that this objection was not properly preserved for appeal. At the instruction conference, counsel for Deere stated, "we object to 36 on the ground that it is not a statement of duty." He also stated "[i]t's a portion of a Supreme Court opinion dealing with other issues" and further that "it's dicta." Transcript at 2409. We find that this objection sufficiently preserved the issue for appeal.

[21]That case, *Johns-Manville Sales Corp. v. Janssens*, was an asbestos case in which the evidence established forty years of affirmative suppression of information on the health hazards accompanying the use of asbestos. *Id.* This affirmative action extended for a period of time both pre-dating and post-dating the period of asbestos exposure alleged by Janssens. *Id.* at 250. The Florida appeals court said these post-exposure acts were evidence of repetition and concealment of malicious, evil-intentioned, reckless and wanton conduct occurring after Johns-Manville initially set out to cover up the health hazards. *Id.* at 256. This cover-up, as indicated, commenced in the 1930's prior to Janssen's exposure (and probably prior to the sale of the asbestos in question). In *Chrysler Corporation v. Wolmer*, 499 So. 2d 823, 826 (Fla. 1986), the Florida Supreme Court reviewed the exact language from *Johns-Manville*, used by the district court in the present case in Instruction 36, and limited its use to asbestos cases. Significantly, this resulted in the reversal of a punitive damages award against Chrysler who was charged with having "actual knowledge" of an inherently dangerous fuel system at the time it commenced the sale of Volare automobiles in 1976 and,

not establish that it should be given in every products case, or, in this case. *Fell* flows against, rather than with, Burke's punitive damages claim. In that case, defendant Kewanee sold Fell's father-in-law a grain-handling elevator in which she became entangled. *Id.* at 913. The trial court granted Kewanee summary judgment on the issue of punitive damages and the Iowa Supreme Court affirmed. *Id.* at 920. While, as indicated, the Iowa Supreme Court noted the language used in Instruction 36 as part of a definition of "willful and wanton" conduct, the Court pointed out that there was no evidence to support the submission of a punitive claim against Kewanee based upon such conduct. *Id.* This was because there was no evidence that Kewanee knew of any similar accidents when it sold the elevator. *Id.* That is essentially the situation here. Goranson, Burke's employer, purchased the Titan combine new in September of 1979. Transcript at 1526. According to a trial stipulation, a one-person hand-injury accident was reported to Deere in August of 1979. *Burke v. Deere & Co.* 780 F. Supp. at 1230-31. The Deere Safety Committee received notice of and reviewed this accident in September of 1979. *Id.* Notice of the first two-person accident was received by Deere on February 29, 1980. *Id.* Almost immediately Deere again convened its Safety Committee and in November of 1980, after two such two-person accidents had been reported, Deere commenced its decal retrofit program. *Id.* When accidents continued, Deere commenced the more extensive retrofit which was being undertaken at the time of Burke's accident. *Id.* at 1233. Thus, *Fell* actually detracts from Burke's

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specifically, of having such knowledge a month prior to the sale of the vehicle to the plaintiff in that case. *Id.* The "willful and wanton" discussion in *Fell*, 457 N.W.2d at 19, was dictum because of the affirmance of nonsubmission of punitive damages. Thus, we are not at all certain that the case establishes a rule of law for claims which do not involve an ultra-hazardous product like asbestos.

contention that Instruction 36 was a proper statement of punitive damages law applicable to this litigation under the evidence adduced at trial. Surely a single, one-person accident occurring a few days prior to the sale to Goranson is not sufficient evidence of "willful and wanton conduct" toward Goranson or Burke, his employee, to support the submission of punitive damages to the jury. Indeed, *Fell* holds to the contrary.

In addition, although Instruction 36 is purportedly limited to assessment of punitive damages, we find, in light of the evidence and arguments made in this case, that the jury could easily have viewed the instruction as an invitation to impose *liability* for failure to retrofit or recall.[22] We repeat, we find no independent duty to retrofit or recall under Iowa law, and Burke did not raise this claim in his pleadings. Moreover, continuing duties appear to arise in Iowa only in the context of negligent failure to warn. Even if this were a failure to warn case, this court has stated that a duty to recall is not generally incorporated in a duty to warn. *Smith v. Firestone Tire & Rubber Co.*, 755 F.2d 129, 135 (8th Cir. 1985). Accordingly, it was error to give Instruction 36.

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[22]The dissent contends that Instruction 36 is a proper statement of Iowa law for this case and argues that a reasonable jury could not squeeze "a duty to retrofit" from its language. You need only look to the paraphrased instruction advanced by the dissent, *infra* at 39a, to refute the dissent's contention. Although Burke sustained an injured hand and lost no appendages, the dissent's amended instruction would inform the jury that if Deere obtained knowledge, after its sale to Goranson, that other two-person accidents had resulted in a loss of arms of users, and Deere continued to sell the Titan combine to others without making satisfactory safety changes, Burke would be entitled to recover punitive damages. A subsequent sale of a combine to another person unrelated to the Burke accident had no substantive relevance whatever in this products case unless offered in support of punitive liability under a duty running in favor of Burke to fit and retrofit later sold combines. Thus, the inference that a jury might draw from Instruction 36 is clear. While we do not seek to debate the propriety of a policy creating a duty to retrofit, it is presently not the law of Iowa in a section 402A case and the existence of such a duty, should it live, was not placed in issue by the pleadings in this matter.

D. Sufficiency of Evidence to Support Punitive Damages

In reviewing the sufficiency of evidence in a diversity case, we apply state law. *See, e.g., American Home Assurance Co. v. Major Tool & Machine, Inc.*, 767 F.2d 446, 447 (8th Cir. 1985). Under Iowa law, we consider the evidence in the light most favorable to the plaintiff. *Larson v. Great West Casualty Co.*, 482 N.W.2d 170, 173 (Iowa App. 1992). The sufficiency of plaintiff's evidence to generate a submissible jury issue is a question of law. *Id.* A reviewing court is not bound by the trial court's conclusions. *Id.* Neither are we to afford deference to the district court's interpretation of a state's law. *Salve Regina College v. Russell*, 111 S. Ct. 1217, 1221 (1991).

In making this determination, we again note that there is no separate cause of action for punitive damages under Iowa law and, therefore, the conduct for which punitive damages are assessed must have occurred at or prior to the time Deere surrendered control of the combine to Goranson. *See Campbell*, 347 N.W.2d at 410. Only evidence which is relevant to the conduct for which liability is imposed can support an award of punitive damages.

This court is familiar with litigation involving the John Deere Titan series combine. *See Christopherson v. Deere & Co.*, 941 F.2d 692 (8th Cir. 1991) and *Lockley*, 933 F.2d 1378. We have reviewed the transcript of the *Lockley* trial and we are convinced the the evidence in this case similarly does not support submission of the issue of punitive damages to the jury.[23] *Accord*

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[23]The dissent, *infra* at 36a n.4, purports to detect a "distaste for punitive damages generally" on the part of the court. It is more likely that it detects a touch of incredulity at a 50 million dollar punitive award to a plaintiff found guilty of forty percent contributory fault against a defendant carrying out a second safety retrofit to remedy an open and obvious danger admittedly recognized by the plaintiff prior to the accident.

Lockley, 933 F.2d at 1390. *See also Wheeler v. John Deere Co.*, 862 F.2d 1404 (10th cir. 1988) (*Wheeler I*); *Melton v. Deere & Co.*, 887 F.2d 1241 (5th Cir. 1989); and *Wheeler v. John Deere Co.*, 935 F.2d 1090 (10th Cir. 1991) (*Wheeler II*) (product liability cases involving the John Deere Titan Series combine, none of which involved an award of punitive damages).

To award punitive damages, a jury must find that the conduct *from which the claim arose* constituted willful and wanton disregard for the rights or safety of another. Iowa Code § 668A.1(1)(a). Conduct is willful and wanton when the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow. *Larson*, 482 N.W.2d at 174. An award of punitive damages is not appropriate when room exists for reasonable disagreement over the relative risks and utilities of the conduct at issue. *Id.; see also Kehm*, 724 F.2d at 623 (applying Iowa law). An award of punitive damages is particularly inappropriate where the risk defendant allegedly disregarded could reasonably have been perceived as slight. *Larson*, 482 N.W.2d at 175. Applying those principles to this case, we find no evidence of any conduct so egregious as to support an award of punitive damages. Accordingly, we find that the district court erred in submitting the issue of punitive damages to the jury.

In *Lockley*, another case involving the same model of Titan combine, we held as a matter of law that the evidence, which is substantially the same evidence as that presented in this case, was "not sufficient to show Deere acted pursuant to a calculated decision that it would likely be cheaper to be sued and pay compensatory damages to persons injured by the Titan series combines it manufactured than to take effective steps to remedy

the problem."[24] *Lockley*, 933 F.2d at 1390. We acknowledged that "such a showing would have warranted a punitive damages award." *Id.*

The district court, in its order denying Deere's motion for judgment notwithstanding the verdict or new trial on the punitive damages issue, relied on evidence "presented at trial [which] raised a question for the jury as to whether or not this delay [in modification] was motivated by a savings to Deere of approximately $2,700,000." and speculated on its own that "[a] delay in selling the 3,100 pipeline machines, for the purpose of modifying them, would surely have cost Deere a great deal of money."[25] *Burke*, 780 F. Supp. at 1241. The conduct on which the district court relied to justify its submission of the punitive damages issue to the jury occurred after the date of the decal retrofit program, related to knowledge acquired after this date, and is therefore irrelevant to the punitive damages issue.

Even if the evidence were relevant to the underlying claim, this scant evidence of an incidental economic benefit or monetary savings simply does not amount to the type of "calculated decision-making" required to justify an award of punitive damages. Specifically, there is no evidence that Deere considered and rejected a more costly field modification program when it

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[24]Much was made of the fact that this case involved evidence of "3100 of the pipeline machines"--that is, machines in the distribution pipeline after the date of factory design change which were sold without the modification--which related to the issue of punitive damages and was allegedly not presented in other Titan combine cases. At oral argument, counsel for Deere stated, without refutation, that the pipeline combine evidence was considered in *Lockley*. Moreover, at the hearing on post-trial motions in the present case, counsel for plaintiff conceded that evidence of the 3100 pipeline machines was indeed presented in *Lockley*. Transcript of motion hearing at 141 (June 27, 1991).

[25]We note that the combine which injured Burke was not a "pipeline" machine, so this is irrelevant.

decided to implement the decal program at a cost of $8300 two years after the sale at issue in this case. The fact that a manufacturer undertakes a less costly alternative to remedy a perceived problem before moving to a more expensive recall program does not amount to willful or wanton conduct in disregard of the rights and safety of others. There was no showing that Deere had any reason to believe that the decal program would not adequately solve the problem. We find no evidence of any calculated decision by Deere which would rise to the level of egregious willful, wanton conduct. Punitive damages are not awarded for conduct which is merely objectionable. *Larson*, 482 N.W.2d at 175. We thus find that evidence on the timeliness of Deere's response to accident reports is irrelevant, and even if it were relevant, it is not sufficient to justify punitive damages under Iowa law. *Accord Lockley*, 933 F.2d at 1390.[26]

E. Verdict Form

Moreover, even if a punitive damages instruction were warranted, the verdict form, in combination with an improper closing argument by Burke, rendered the punitive damages award fatally defective. The jury in this case was provided with a verdict form which told them "if your answer to [a question regarding whether the conduct was directed at plaintiff] is no, a portion of the punitive damage award to be fixed by the court

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[26]Because we find that an instruction on punitive damages cannot be supported in this case, we need not reach the issue of whether or not the Iowa punitive damage statute meets the due process requirements set forth in *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991), except to note, in passing, that this may be the sort of verdict that the Supreme Court had in mind when it referred to "extreme results that jar one's constitutional sensibilities." *Id.* at 1043. We further express concern that the trust fund component of the Iowa statute may implicate questions of standing and justiciability as well as constitutional issues of due process and excessive fines, but again, we need not reach the issue.

will be paid into a civil trust fund administered by this court."[27] Deere objected to this statement as an improper indication to the jury of the effect of their finding and as an appeal to their charitable instincts.

Under Iowa law, it is wholly unnecessary and generally improper for the jury to be informed of the effect of specific findings on special interrogatories. *Poyzer v. McGraw*, 360 N.W.2d 748, 753 (Iowa 1985). It is also improper for counsel to direct the jury's attention to the impact of any specific findings. *Id.* In many cases, such an instruction would constitute merely harmless error, but in this case, in light of the other errors, it does not.

In closing argument, counsel for Burke argued that seventy-five percent of the punitive damages award "will go into a civil trust fund to help prevent this sort of thing in a different way" and that "75 percent will go into a special fund, a special trust fund, to be administered by the courts for others than Burke." Transcript at 2474 and 2450. Burke's counsel also mentioned the jury's "relatives, sons and fathers and people going out to do the work this machine--unsuspecting, see, that are yet to be, the tragedies that are yet to be." Transcript at 2476. This is clearly the type of improper "golden rule" argument which is not allowed under Iowa law. *Russell v. Chicago, R. I. & P. R. Co.*, 86 N.W.2d 843, 848 (Iowa 1957). In light of the evidence admitted in this case on other accidents, all of which involved injuries more serious than Burke's, and the improper argument by plaintiff's counsel, we are compelled to find that Deere was prejudiced. Also, the size

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[27]The statement that the district court would adminster the fund is clearly a misstatement and is not authorized by the Iowa statute. This error is not of tremendous import to this decision, except that it buttresses Deere's contention that the jury likely felt it was creating an injury fund to be administered by the district court for the benefit of victims of other accidents involving farm implements, possibly including the amputees the jury had seen testify in the case.

of the verdict leads us to conclude that the jury indeed sought to create some sort of injury fund or to improperly engage in a social reallocation of resources for the benefit of parties not properly before the court.

III. CONCLUSION

For the reasons set forth above, we find that the compensatory award cannot stand. The verdict has been tainted by the improper admission of evidence and the submission of erroneous legal theories to the jury. Although the dissent agrees that the punitive award must be reversed, it would preserve the compensatory award and remand for retrial upon only that issue. Such an approach violates the holding in *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 500 (1931). Upon remand, retrial on less than all the issues is permissible but only if the issue remanded is "so distinct and separable from the others [in the trial] that a [new] trial of it alone may be had without injustice." *Id.* Thus, even if we agreed that the evidence supports submission of the case on the question of punitive damages, which we do not, a retrial to a new jury on that issue alone would be improper because the issues underlying compensatory and punitive awards are inextricably intertwined. *See, e.g., Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991); *TXO Production Corp. v. Alliance Resources Corp.*, 61 U.S.L.W. 4766 (U.S. June 25, 1993). The law is also squarely against letting a contested compensatory award stand when punitive damages are set aside, as here. Burke offered evidence on Deere's net worth and wealth in its quest for a large punitive award. Transcript at 1252-53. Such evidence is totally irrelevant to the issue of compensatory damages. "A jury may not consider a defendant's wealth in setting compensatory damages. It is

"'improper, irrelevant, prejudicial, and clearly beyond the legally established boundaries.' " *Feld v. Merriam and Wynne, Inc.*, 485 A.2d 742, 748 (Pa. 1984) (internal citations omitted); *see also Adams v. Murakami*, 813 P.2d 1348, 1358 (Cal. 1991) (stating evidence of wealth may improperly taint the jury's decision). In Iowa, evidence of a defendant's wealth is admissible only where the evidence supports exemplary damages. *Hall v. Montgomery Ward & Co.*, 252 N.W.2d 421, 424 (Iowa 1977). A large compensatory award premised on limited evidence can, in some cases, raise the question whether the jury was improperly influenced on compensatory damages by the magnitude of the wealth of the defendant. *Id.* at 426. It is prejudicial for a plaintiff to improperly introduce the question of wealth into the trial of a case involving only compensatory damages. *See, e.g., Trapalis v. Gershun*, 145 N.W.2d 591, 596 (Iowa 1966). There was no instruction at the trial that told the jury to disregard Deere's wealth in setting the amount, if any, of compensatory damages.

We remand Burke's claim to the district court for a new trial on the issues of liability, causation and damages. We also reverse the award of punitive damages with directions to the district court to dismiss Burke's punitive damages claim.

HEANEY, Senior Circuit Judge, dissenting.

I respectfully dissent. The majority has advanced no valid reason to justify setting aside the verdict for compensatory damages and disclosed no sound reason for holding that this record could not justify a properly instructed jury in awarding punitive damages.

I agree that the punitive damage award must be reversed, but only because plaintiff's counsel intimated in his closing argument that other victims of the defective combine would share in the award. This error, combined with the instruction informing the jury that seventy-five percent of the award would be placed in a

trust fund to be administered by the district court, may well have misled the jury, causing it to award more in punitive damages than it otherwise would have awarded without the improper argument and unnecessary instruction.[1] Thus I would remand to the district court with instructions to retry the punitive damages issue.[2]

I. Compensatory Damages

I turn first to the decision of the panel majority to set aside the compensatory damage award of $650,000, reduced by the district court to $390,000 to reflect the jury's verdict that the plaintiff was forty percent at fault for his injuries. I have read and

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[1]The district court erroneously informed the jury in Question No. 3 of the Special Interrogatories on Punitive Damages that "a portion of the punitive damage award to be fixed by the court will be paid into a civil trust fund administered by this court" if the jury found the conduct of Deere not directed specifically at Burke. Iowa Code § 668A.1 provides that at least seventy-five percent of such an award "be ordered paid into a civil reparations trust fund administered by the state court administrator." Although I do not find the present case an appropriate opportunity to resolve the question whether Iowa juries should ever be informed of the destination of such funds, I do think the erroneous information provided in the present case, along with the argument of counsel, proved prejudicial.

[2]The majority argues that remand for retrial of the punitive damages issue alone would be impermissible, citing *Gasoline Products Co., Inc. v. Champlin Refining Co.*, 283 U.S. 494 (1931). The *Gasoline Products* Court did not prohibit such a practice. It stated specifically that the Seventh Amendment does "not require that an issue once correctly determined, in accordance with the constitutional command, be tried a second time, even though justice demands that another distinct issue, because erroneously determined, must again be passed on by a jury." *Id.* at 498. The admonition of the Supreme Court was not to resort to partial remand except in cases in which "the issue to be retried is so distinct and separable from the others that retrial of it alone may be had without injustice." *Id.* at 500. That is precisely the situation we have in this products liability case based on strict liability. The jury already has properly decided - as have the juries in the other cases involving this combine - that the Deere combine at issue was defective and unreasonably dangerous as designed, manufactured, and sold by Deere. Whether Deere acted with willful and wanton disregard of the rights or safety of another is distinct from the *existence* of the defect; rather, it concerns Deere's knowledge or awareness of that defect and its actions or inactions in consideration of that knowledge. It is an issue that is entirely separable

reread the majority opinion with respect to the compensatory damage award. The majority's only specific objection to this award is that Jury Instruction No. 14 does not correctly reflect Iowa law. The majority errs in this regard.

Jury Instruction No. 14 provided the following:

> It is undisputed that there was no warning by the lower cleanout door at the time of the accident. There was a caution decal above the toolbox, which is a few feet away from the lower cleanout door.
>
> Where an adequate warning or direction is given, the seller may reasonably assume that it will be read and heeded. A product bearing a caution or direction, which is safe for use if the caution is followed, is not in a defective condition, nor is it unreasonably dangerous.
>
> It is admitted that when made and sold, the combine had no caution decal on the auger housing. If you find a warning was necessary and find that the caution decal over the toolbox was inadequate, either because of its placement or its wording, or that the danger of severe injury at the lower cleanout door was so great that no such caution decal would cure the danger or that the caution could not be followed, then you may find that the product was defective and unreasonably dangerous. If you do not so find, then you may find that the product was not defective or unreasonably dangerous.

At trial, Deere objected to the third paragraph of this instruction, then without the last sentence, as "surplusage" and as commenting on evidence favorable to the plaintiff. Tr. at 2378. On appeal, Deere repeats its trial objection and argues further that the instruction failed to instruct on an open and obvious danger defense and that it confuses two theories of recovery: "Because

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from the question whether the product was defective and unreasonably dangerous. Thus, retrial on the issue of punitive damages alone may easily be had in this case without injustice.

the failure to warn claim was submitted with the defective design theory, it is not possible to determine on which basis the jury found Deere liable." Appellant's Brief at 44.

Deere misses the dispositive Iowa law on this point. Under Iowa strict liability law, "a product, although faultlessly made, may nevertheless be deemed defective so as to subject the manufacturer to strict liability if it is unreasonably dangerous to place the product in the hands of a user without a suitable warning." *LaCoste v. Ford Motor Co.*, 322 N.W.2d 898, 900 (Iowa Ct. App. 1982) (per curiam). Inadequate warning may in fact *be* the product defect under Iowa law; it need not be a separate cause of action.

Deere further misleads the court by arguing that the instruction should have included the defense that the danger of an auger is open and obvious. The majority also appears to subscribe to this position. Both miss the point: The Deere combine was not unreasonably dangerous because it utilized an auger; it was unreasonably dangerous because of the "alarming propensity for misuse . . . in the absence of a proper warning." *LaCoste*, 322 N.W.2d at 901. That alarming propensity for misuse in the two-person accident that occurred here is *not* open and obvious, and it is ludicrous for Deere to suggest it was: Indeed, if that alarming propensity for misuse were open and obvious to Deere, it should have corrected it forthwith. The score of accidents occurring on this same combine in nearly identical circumstances proves that unreasonably dangerous defect.[3]

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[3]The majority does not dispute that inadequate warning may render a product defective and unreasonably dangerous under Iowa law. It responds only that this "was not Burke's theory." *Supra* note 7. Burke's "theory" was strict liability in tort for the design, manufacture, and sale of a defective and unreasonably dangerous product. Iowa law allows him to recover for his injuries caused by that product, and Instruction No. 14 quite correctly reflects that law.

The majority further errs when it concludes that "[t]his instruction permitted the jury to find that the product was defective and unreasonably dangerous by reason of inadequate decal warning alone." *Supra* at 10a. As noted above, an inadequate warning may indeed render a product defective and unreasonably dangerous, but the jury in this case *first* had to find that the "warning was necessary" because of the inherent danger of the product. Only after it found that a suitable warning was necessary could it find Deere's decal inadequate - and only then could it find the combine defective.

The majority also finds that Instruction 14 did not give the jury any option to consider additional matters such as all the warnings given to Burke and his general knowledge and experience. *Supra* at 11a. The jury was, however, properly instructed to consider assumption of risk, comparative fault, Burke's awareness of the danger of the product, proximate cause, and warnings disregarded by Burke. *See* Jury Instructions Nos. 12, 19, 24, 25, 26, and 27. When reviewing the charge to a jury, "[a]ll instructions must be read and construed together, not piecemeal or in artificial isolation." *Sanders v. Ghrist*, 421 N.W.2d 520 (Iowa 1988); *accord Grogan v. Garner*, 806 F.2d 829, 836 (8th Cir. 1986). I believe that the instructions as a whole fairly and adequately presented the substantive Iowa law in this case and were neither misleading nor confusing. The jury's compensatory award reflects its own apt understanding of the case. It found Burke forty percent responsible for his injuries, and there has been no suggestion that the award was excessive.

In a final, conclusory effort to strengthen its argument with respect to the reversal of the compensatory damage award, the majority states that the compensatory verdict was "tainted by the improper admission of evidence and the submission of erroneous legal theories to the jury." *Supra* at 30a. It is difficult to respond

to such a generalized allegation except to point to its lack of substance and to reiterate that there was no confusion about evidence or legal theories in the district court during this trial. This case was the second time that the same product, injury, and issues have been tried before the same judge and with representation by the same lawyers. True, the plaintiff and the jury are different, but this jury was not naive: it had the benefit not only of very well versed counsel and court, but even took a trip to the field to study this combine up close and ask questions.

I would add that the majority's opinion extends an open invitation to Burke to amend his case on remand to include theories of recovery under negligence, and what was once rather a simple case on compensatory damages could evolve into something a good deal more complicated, but with the end result likely being about the same as it was here.

II. Punitive Damages

The panel majority finds several reasons to set aside the punitive damage award: It finds error in a jury instruction, prejudice in several evidentiary rulings, impropriety in closing argument, and insufficient evidence to support any such award in the first place.[4] I believe all but one of the majority's findings are without merit. As I stated above, I would remand to the

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[4]The majority's opinion appears to manifest a distaste for punitive damages generally. I note for the record that such awards, firmly rooted in our common law for well over a century, are perfectly proper in an appropriate case and offend neither Iowa law nor the United States Constitution. *See, e.g., TXO Production Corp. v. Alliance Resources Corp.*, _____ U.S. _____ (1993). Recent empirical study, moreover, has debunked the mythology of "skyrocketing awards," "runaway juries," and "competitive disadvantage" too often erroneously associated with such awards. *See, e.g.*, Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 Iowa L.R. 1 (1992).

district court for a retrial on the punitive damage award because I think counsel's closing argument and the unnecessary instruction from the district court may have prejudicially affected the award. To deny Burke any opportunity to submit the punitive damages issue to the jury is to ignore Iowa punitive damage law, which is fully consistent with decisions of the United States Supreme Court.

A. Jury Instruction No. 36

The majority's analysis unfortunately goes awry because of considerable confusion about Jury Instruction No. 36 and the applicable Iowa law. Instruction 36 provided that

> [t]he legal basis for punitive damages is established in product liability cases where the manufacturer is shown to have knowledge that its product is inherently dangerous to persons or property and that its continued use is likely to cause injury or death, but nevertheless continues to market the product without making timely feasible modifications to eliminate the danger or make adequate disclosure and warning of such danger.

With the exception of the word "timely," this instruction is a verbatim quote from *Fell v. Kewanee Farm Equip. Co.*, 457 N.W.2d 911, 919 (Iowa 1990) (en banc). The *Fell* court quoted this language with approval as a proper definition of "willful and wanton disregard for the rights or safety of another" in the context of products liability cases. *Id.* The majority, presumably applying Iowa law, now concludes that the Iowa Supreme Court, sitting *en banc*, should have narrowed its analysis.

Deere objected to this instruction at trial because "it is not a statement of duty"; because "it was some dicta, quoting from other treatises"; because there was insufficient evidence for its

submission; and because "[i]t's argumentative and it suggests a plaintiff's theory." Tr. at 2409-11. Deere's new and improved argument on appeal is that Instruction 36 "miscomprehends and misapplies language from *Fell*." Appellant's Brief at 33. Finally, at oral argument, the objection was further transformed to state that Instruction 36 erroneously creates a "duty to retrofit" in Iowa law.[5]

The majority, declining to choose an objection, states only that "[w]e agree that the instruction was erroneous under the evidence in this case." *Supra* at 22a. The majority's analysis misstates the holding from *Fell* to conclude that this case, like *Fell*, is one in which the evidence was insufficient to present a punitive damages question to the jury. The *Fell* court was explicit about why the evidence was insufficient in that case:

> This is not a case in which [the manufacturer] knew that people were being injured by exposed gears and ignored this knowledge for economic reasons. To the contrary, the evidence shows that [the manufacturer] manufactured and sold thousands of these elevators without a similar accident occurring. Simply put, risk of injury from exposed beveled gears on the elevators was not so great as to make it highly probable that an injury would occur.

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[5]The majority finds that the issue of a duty to retrofit was sufficiently preserved for appeal. *Supra* at 22a n.20. The majority ignores the applicable federal rule: "No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, *stating distinctly the matter objected to and the grounds of the objection.*" Fed. R. Civ. P. 51 (emphasis added); *accord Board of Water Works Trustees v. Alvord, Burdick & Howson*, 706 F.2d 820, 824 (8th Cir. 1983). Further, "[a] party may not state one ground when objecting to an instruction and attempt to rely on a different ground for the objection on appeal or on a motion for a new trial." 9 Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure* § 2554 (1971); *accord Siegfried v. Kansas City Star Co.*, 298 F.2d 1, 7 (8th Cir.) ("It is apparent that the objection now raised is somewhat different from that raised in the trial court, and hence the criticism of the instructions now made is not properly before us for consideration."), *cert. denied*, 369 U.S. 819 (1962).

Fell at 920. In the instant case, the risk of injury from the combine defect was sufficiently great to make it highly probable that injuries would occur; at least twenty-six injury-producing accidents did occur, most of which were nearly identical to Burke's; and there is evidence that Deere knew of the defect and the injuries, but put off a costly retrofit program until the accident reports became increasingly common. Therefore, I conclude that under Iowa law, the district court did not err in sending the question of punitive damages to the jury with Instruction No. 36.

The majority also concludes that "although Instruction 36 is purportedly limited to assessment of punitive damages, we find . . . that the jury could easily have viewed the instruction as an invitation to impose *liability* for failure to retrofit or recall." *Id.* at 24a. Although not entirely clear, this may be what the majority refers to in its vague discussion of "erroneous legal theories" alluded to above in my discussion of compensatory damages. I cannot agree with the majority's conclusion. First, the instruction unambiguously states that it concerns the legal basis for *punitive* damages. Second, the Supreme Court of Iowa does not imply a "duty to retrofit" in the language used; nor do I see how a reasonable jury could squeeze such a meaning from the straightforward language. Rather, it allows a jury to find willful and wanton disregard for the rights and safety of another if a manufacturer continues to sell a product it knows to be dangerous without making appropriate feasible modifications or adequate warnings. The same instruction could have been worded differently in this case without changing its meaning:

> The legal basis for punitive damages is established in this case if Deere is shown to have knowledge that its combine is removing farmers' arms and that its continued use is likely to continue to remove farmers' arms, but nevertheless continues

> to sell the combine without making feasible changes to eliminate the danger of limb removal or at least adequately warning farmers of the danger.

I agree with the Iowa Supreme Court that such an instruction fairly defines "willful and wanton disregard for the rights or safety of another" in the context of products liability.[6] I find no error in the instruction.

B. Sufficiency of Evidence

The majority's theory of this case concludes that the focal point of the defective product inquiry is not the time of sale, but after the caution decal was affixed to the combine. Deere not only does not raise this issue, but vigorously argues that the focal point of the defective product inquiry must be the time of sale. Deere's position is understandable, for by moving up the focal point of the defect inquiry to sometime after the implementation of the decal program, the majority also moves up the threshold of the punitive damages analysis (under its own restrictive theory) to a time when Deere had greater knowledge of the danger of its product and specific notice that the product was removing body parts from unwary farmers in the field.

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[6]The Iowa Supreme Court's approval of awarding punitive damages in cases described by the language in *Fell* is not unique. The Alaska Supreme Court, as one example on point, has held the same:

> We also reject the argument that punitive damages have no place in a strict liability case . . . . Where . . . plaintiff is able to plead and prove that the manufacturer knew that its product was defectively designed and that injuries and deaths had resulted from the design defect, but continued to market the product in reckless disregard of the public's safety, punitive damages may be awarded.

Sturm, Ruger & Co. Inc. v. Day, 594 P.2d 38, 46-47 (Alaska 1979) (citing numerous cases from other jurisdictions), *modified on other grounds*, 615 P.2d 621 (Alaska 1980), *cert. denied*, 454 U.S. 894 (1981).

Thus, even if one accepts the majority's ruling that all evidence admissible to prove willful and wanton conduct by Deere must have occurred at or before surrendering control of the combine - and I do not accept that unsupported ruling - then a submissible jury question on punitive damages still is presented by the evidence.

Deere did not mail the caution decal at issue to prior purchasers of the combine until April 1981. But Deere had notice of the first accident occurring with this combine in August 1979. It received another accident notification in February 1980, another in September 1980, and yet another in December 1980. Deere's Product Safety Committee had suggested a caution decal at a meeting as early as September 1979, and it recommended that the Design Division review the combine for possible changes in April 1980. Despite the timely suggestions of the Product Safety Committee, Deere management dragged its feet until accident reports became increasingly common. And even then, a year after design modifications were first suggested, the decision was made to mail out an inadequate and ineffective caution decal. Evidence also was introduced that Deere held a clinic for custom combiners in March 1981 in Wichita, Kansas, in which it overlooked informing the clinic participants of the danger of the combine design or of the accident reports.

A submissible jury issue for the question whether punitive damages should be awarded under Iowa law need only raise a material question of fact regarding whether Deere had knowledge that its combine was causing serious injuries and that its continued use was likely to continue to cause injuries, but nevertheless continued to market the combine without making feasible changes to eliminate the danger or at least adequately warning of the danger. *Accord Fell*, 457 N.W.2d at 919. All the evidence outlined above would be admissible even under the majority's

overly restrictive theory of punitive damages under strict liability. I believe it is sufficient evidence to send that issue to the jury in this case. I would remand to the district court with directions to submit that question to a jury with appropriate and unambiguous instructions.

III. Evidentiary Issues

Concerning the admissibility of contested evidence, the majority correctly rules that evidence of other substantially similar accidents and evidence of subsequent remedial measures was admissible in this case. Indeed, it will again be admissible on retrial. Despite this concession, the majority finds the evidence was nonetheless prejudicial because it was not used correctly: again, the majority errs.

The majority finds an abuse of discretion in the district court's admission of evidence of subsequent remedial measures, because "the retrofit evidence was admitted as ostensibly relevant to Deere's state of mind relating to imposition of punitive damages." *Supra* at 18a. I cannot agree. The district court's ruling on the post-trial motions expressly states that post-sale conduct by Deere, over and above that necessary to show the existence of a dangerous defect, was admitted for the limited purpose of impeaching Deere's testimony that it had taken all reasonable steps to rectify the dangerous situation presented by the combine. *Burke v. Deere & Co.*, 780 F. Supp. 1225, 1245-47 (S.D. Iowa 1991). The district court even takes the trouble to repeat itself: "As previously mentioned, the court did not allow evidence for Deere's post-sale and post-accident conduct to demonstrate Deere's state of mind." *Id.* at 1256. The majority's contrary finding seems to challenge the integrity of the district court in a manner I cannot accept.

The majority also rules that because Deere was willing to stipulate to notice of other accidents and the feasibility of subsequent design changes, the evidence of other accidents occurring under substantially similar circumstances could not properly be admitted to prove these issues. *Supra* at 14a. The majority, however, provides no authority for the proposition that the admissibility of evidence is diminished because the opposing party offers to stipulate to issues for which such evidence might be admitted. I believe the appropriate analysis for the admission of such evidence is whether the court abused its discretion - a finding the majority cannot make because there was no abuse. There were twenty-two accidents that occurred under substantially similar circumstances before Burke's own injury. Notwithstanding, the district court exercised sound discretion and allowed the live testimony of only five victims of those accidents.

The majority also states that evidence of these other accidents was used in the submission of the punitive damages question to the jury, and that the use of this evidence served to enhance the award of punitive damages. As I stated above, I believe there was error regarding counsel's closing argument intimation that part of the award of punitive damages would serve to compensate similarly situated victims. The error, however, was the ambiguous and misleading statement of counsel - not the properly admitted evidence of other similar accidents.

IV. Conclusion

Accordingly, I would reverse the award of punitive damages and remand for a new determination of how much, if any, those damages should be. I must, however, dissent from the holding of the panel majority that today works an injustice by throwing

out the baby with the bath water - needlessly reversing the entire trial below on suspect grounds, and erroneously redefining the parameters of Iowa products liability law.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 92-1990SICB

Clair W. Burke,
Appellee,

vs.

Deere & Company, a/k/a
John Deere Company, a
Delaware corporation,
Appellant.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. Judge McMillian would grant the suggestion for rehearing en banc.

The petition for rehearing is also denied.

September 22, 1993

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

(2)

Supreme Court, U.S.
FILED
JAN 19 1994
OFFICE OF THE CLERK

No. 93-988

In The

Supreme Court of the United States

October Term, 1993

CLAIR W. BURKE,

Petitioner,

v.

DEERE & COMPANY, a/k/a JOHN DEERE COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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36 pp

QUESTION PRESENTED

SHOULD THIS COURT GRANT CERTIORARI TO REVIEW THE COURT OF APPEALS' ORDER DENYING PETITIONER'S MOTION TO DISMISS APPEAL WHEN THE ORDER IS NOT IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS, THE QUESTIONS PRESENTED BY PETITIONER ASSUME FACTS THAT DO NOT APPLY TO THIS CASE AND MEET NONE OF THE CRITERIA FOR REVIEW BY THE SUPREME COURT ON CERTIORARI, THE COURT OF APPEALS DID NOT SET FORTH THE REASONS FOR ITS ORDER, AND THE ORDER IS UNREPORTED AND OF NO PRECEDENTIAL VALUE?

PARTIES TO THE PROCEEDINGS

Respondent Deere & Company, a/k/a John Deere Company is publicly owned. It owns no subsidiaries that are not wholly owned.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

PROVISIONS OF STATUTES AND RULES INVOLVED 3

STATEMENT OF THE CASE 3

1. Facts Pertinent to Petition 3

2. Inaccurate Statements in the Petition 10

REASONS FOR DENYING THE PETITION 14

1. The Petition Erroneously Assumes Petitioner's February 28 Motion To Amend Judgment Was In Substance A Rule 60(a) Motion, And That The Court Of Appeals Considered It As Such 16

2. The Asserted Conflict With The "Ten-Day" Approach Does Not Exist 22

3. The Decision In This Case Is Not In Conflict With The Cases Cited In The Petition 25

4. The Second Question Presented Raises No Special Or Important Reasons For Review By Writ Of Certiorari 27

5. The Petition Was Not Timely Filed 29

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Alimenta (U.S.A.), Inc. v. Anheuser-Busch Companies, Inc., 803 F.2d 1160 (11th Cir. 1986).....25, 26

Buchanan v. Stanships, Inc., 485 U.S. 265, 108 S.Ct. 1130, 99 L.Ed.2d 289 (1988)..... 26

Charles v. Daley, 799 F.2d 343 (7th Cir. 1986) 18

Dalton v. First Interstate Bank of Denver, 863 F.2d 702 (10th Cir. 1988)..... 18

Dura-wood Treating Co. v. Central Forest Industries, Inc., 694 F.2d 112 (5th Cir. 1982)..... 19

FTC v. Minneapolis Honeywell Regulator Co., 344 U.S. 206, 73 S.Ct. 245, 97 L.Ed. 245 (1952) 18

In re Galiardi, 745 F.2d 335 (5th Cir. 1984)..... 20

Harcon Barge Co., Inc. v. D & G Boat Rentals, Inc., 784 F.2d 665 (5th Cir. 1986), *cert. den.*, 479 U.S. 930, 93 L.Ed.2d 351, 107 S.Ct. 398 (1986)... 19, 24, 25

Jackson v. Schoemehl, 788 F.2d 1296 (8th Cir. 1986)...23, 24

Keith v. Truck Stops Corp. of America, 909 F.2d 743 (3d Cir. 1990) 18

Martinez v. Sullivan, 874 F.2d 751 (10th Cir. 1989) 23

Miller v. Transamerica Press, Inc., 709 F.2d 524 (9th Cir. 1983) 25-27

Munden v. Ultra-Alaska Associates, 849 F.2d 383 (9th Cir. 1988) 14

Offshore v. Prod. Contractors, Inc. v. Republic Underwriters Insurance Company, 910 F.2d 224 (5th Cir. 1990).....25, 27

TABLE OF AUTHORITIES – Continued

Page

Osterneck v. Ernst & Whinney, 489 U.S. 169, 103 L.Ed.2d 146, 109 S.Ct. 987 (1989)..... 18

St. Paul Fire & Marine Ins. Co. v. Continental Casualty Company, 684 F.2d 691 (10th Cir. 1982).....23, 25

Toscano v. Chandris S.A., 934 F.2d 383 (1st Cir. 1991) 18

United States v. One Urban Lot, 882 F.2d 582 (1st Cir. 1989) 23, 24

Western Indus. v. Newcor Canada, Ltd., 709 F.2d 16 (7th Cir. 1983).....23, 24

No. 93-988

In The

Supreme Court of the United States

October Term, 1993

CLAIR W. BURKE,

Petitioner,

v.

DEERE & COMPANY, a/k/a JOHN DEERE COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

Respondent Deere & Company ("Deere") respectfully opposes the Petition for Writ of Certiorari ("Petition") to review the order denying Petitioner's motion to dismiss appeal entered by the United States Court of Appeals for the Eighth Circuit in the above-captioned case on August 4, 1992.

OPINIONS BELOW

The Court of Appeals' order denying Petitioner's motion to dismiss appeal, of which review is sought, is unreported and is included in Petitioner's Appendix at

p. 1a. The Court of Appeals' order denying reconsideration and Petitioner's suggestion for reconsideration en banc is included in Petitioner's Appendix at p. 16. The Court of Appeals' decision on the merits is reported at 6 F.3d 497 (8th Cir. 1993), and is included in the Appendix at pp. 3a-44a. The Court of Appeals' order denying rehearing and Petitioner's suggestion for rehearing en banc is included in the Appendix at p. 45a. The District Court decision on Deere's motions for judgment notwithstanding the verdict and for new trial is reported at 780 F.Supp. 1225 (S.D. Iowa 1991).

JURISDICTION

Jurisdiction in the District Court was based upon 28 U.S.C. § 1332(a)(1) and jurisdiction in the Court of Appeals was based upon 28 U.S.C. § 1291. The initial decision of the Court of Appeals reversing the judgment against Deere was entered on August 13, 1993. On August 26, 1993 Petitioner served a petition for rehearing with suggestion for rehearing en banc. On August 27, 1993 the initial decision was vacated and a substituted decision entered. The petition for rehearing and suggestion for rehearing en banc were denied on September 22, 1993. The Petition For Writ of Certiorari was filed in this Court on December 21, 1993. It seeks review not of the decision on the merits but only of the August 4, 1992 Court of Appeals' order denying Petitioner's motion to dismiss the appeal on the ground that Deere's second notice of appeal was not timely filed.

PROVISIONS OF STATUTES AND RULES INVOLVED

See Petition for Writ of Certiorari, at pages 2-3.

In addition, Rule of Civil Procedure 60(b) provides in pertinent part:

> On motion . . . the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence . . . or (6) any other reason justifying relief from the operation of the judgment.

Supreme Court Rule 10.1 provides in pertinent part:

> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor.

Supreme Court Rule 13.4 provides in pertinent part:

> The time for filing a petition for a writ of certiorari runs from the date of the judgment or decision sought to be reviewed is rendered . . . However, if a petition for rehearing is timely filed . . . the time for filing . . . runs from the date of the denial of the petition for rehearing or the date of a subsequent judgment.

STATEMENT OF THE CASE

1. Facts Pertinent to Petition.

The Statement and Introduction of the Case at pp. 3-7 of the Petition, and the Reasons for Granting Certiorari at pp. 8-11 of the Petition, misstate relevant facts, omit to include other relevant facts, and assert as facts matters

for which there is no support and which are not true. The following are the undisputed facts pertinent to the questions presented by the Petition:

1. The initial Judgment in this case was entered on November 26, 1990. On December 7, 1990 Deere filed timely motions for judgment notwithstanding the verdict under Fed. R. Civ. P. 50(b), for new trial under Fed. R. Civ. P. 59(a), and to alter or amend the judgment under Fed. R. Civ. P. 59(e). Deere's motions for judgment notwithstanding the verdict and new trial were denied by the District Court on December 4, 1991, on the condition that Petitioner accept a remittitur of the punitive damages from $50 million to $28 million. Petitioner consented to the remittitur on December 23, 1991.

2. Even though its timely Rule 59(e) motion to alter or amend the judgment had not yet been ruled upon, on December 31, 1991 Deere filed a precautionary Notice of Appeal, stating therein that it believed the Notice of Appeal was premature and that it recognized a new notice of appeal may be required after ruling on the pending Rule 59(e) motion. On January 13, 1992 the Clerk of the Court of Appeals acknowledged by letter that Notice of Appeal was premature and the appeal was not docketed.

3. On January 9, 1992, the District Court entered an Order on Deere's pending Rule 59(e) motion to alter or amend the November 26, 1990 Judgment. An Amended Judgment was entered by the Clerk of Court on January 9, 1992.

4. On January 17, 1992 Petitioner filed his "Plaintiff's Motion to Amend Amended Judgment of January 9,

1992," in which he moved "pursuant to Federal Rule of Civil Procedure 59(e)", to amend the Amended Judgment: (1) to grant him punitive damages of $28 million rather than $7 million and (2) to specify November 26, 1990 (rather than the date of the Amended Judgment) as the time from which post-judgment interest was to run and (3) to specify the rate of post-judgment interest.

5. On February 18, 1992 the District Court entered an Order on Petitioner's January 17, 1992 Rule 59(e) motion to amend the Amended Judgment stating, inter alia, that post-judgment interest should be calculated as if the judgment entry of January 9, 1992 were entered November 26, 1990. However, the District Court concluded its Order by giving specific instructions to the Clerk of Court regarding amendment of the January 9, 1992 Amended Judgment as follows:

> THEREFORE IT IS ORDERED that the plaintiff's motion to alter and amend the judgment pursuant to Fed.R.Civ.P. 59(e) is granted. The third paragraph of the January 9, 1992, judgment is stricken and the following placed in lieu thereof: IT IS FURTHER ORDERED that judgment is rendered against the defendant in the amount of $28,000,000 in punitive damages. Of this amount, $7,000,000, plus reasonable attorney's fees and costs, are awarded to the plaintiff. The remaining balance is to be held in an interest bearing account by the Clerk of this Court until further order of this court.

This specific order to the Clerk of Court regarding entry of judgment did not include *any* award of interest on the punitive damages. In addition, it contained no instruction to the Clerk of Court regarding interest on the award of compensatory damages.

6. On the same date, February 18, 1992, the Clerk of Court entered a Second Amended Judgment. It provided that:

> IT IS ORDERED AND ADJUDGED that judgment is rendered in favor of the Plaintiff, Clair W. Burke, for $390,000.00 actual damages plus interest at 10% from and after September 15, 1986, until date of this order, and interest thereafter at the rate as provided by law pursuant to 28 U.S.C. § 1961.
>
> IT IS FURTHER ORDERED that judgment is rendered against the Defendant in the amount of $28,000,000 in punitive damages. Of this amount, $7,000,000, plus reasonable attorney's fees and costs, are awarded to the Plaintiff. The remaining balance is to be held in an interest bearing account by the Clerk of this Court until further order of this court.

This Second Amended Judgment is *exactly* as ordered by the District Court in its Order of February 18, 1992.

7. On February 28, 1992, within 10 days after entry of the Second Amended Judgment, Petitioner filed his "Plaintiff's Motion to Amend Second Amended Judgment of February 18, 1992" ("February 28 Motion to Amend Judgment"), in which he again moved the court *"pursuant to Federal Rule of Civil Procedure 59(e)"* to specify (1) the date from which post-judgment interest is to accrue, and (2) the rate of post-judgment interest.

8. On April 1, 1992 the District Court entered an Order which states in part that: "Plaintiff's third *motion to alter or amend the judgment* brings this matter before the court. After *careful consideration* the court *grants* the

motion." (emphasis added). It then ordered that the "current judgment entry in this case [the Second Amended Judgment] is *vacated* pursuant to Federal Rule of Civil Procedure *59(e)*. The Clerk of Court shall enter a *new judgment* as follows: . . . ". (emphasis and brackets added). Thereafter the District Court set out exactly how the new judgment should read:

> IT IS ORDERED AND ADJUDGED that judgment is rendered in favor of the Plaintiff, Clair W. Burke, for $390,000 actual damages plus interest at 10% per annum from September 15, 1986, until *November 26, 1990*, and interest thereafter at the rate *in effect November 26, 1990*, as provided by law pursuant to 28 U.S.C. section 1961.
>
> IT IS FURTHER ORDERED that judgment is rendered against the Defendant in the amount of $28,000,000 in punitive damages *plus interest from November 26, 1990, at the rate in effect November 26, 1990, as provided by law pursuant to 28 U.S.C. section 1961*. Of this amount $7,000,000, plus reasonable attorney's fees and costs, *and post-judgment interest thereon*, are awarded to the Plaintiff. The remaining balance is to be held in an interest bearing account by the Clerk of this Court until further order of this court.
>
> IT IS FURTHER ORDERED that judgment be rendered in favor of the Plaintiff for costs in this action of $9,422.00, *to be entered as of November 26, 1990. All other requests for additional costs are denied.*

(emphasis added to show difference between Second Amended Judgment and Third Amended Judgment).

9. On the same date, April 1, 1992, the Clerk of Court entered a Third Amended Judgment, exactly in the form ordered by the District Court. Contrary to the assertion by Petitioner on p. 6 of the Petition, the clerk did not enter the Third Amended Judgment to "correct the error arising from its prior omission of the November 26, 1990 post-judgment interest date". The Clerk of Court did so on specific order from the District Court utilizing the language of the District Court, *exactly* as ordered by the District Court.

10. Deere filed a Notice of Appeal on April 28, 1992, within 30 days after entry of the District Court's April 1, 1992 ruling on Petitioner's Rule 59(e) February 28 Motion to Amend Judgment, and within 30 days after entry of the Third Amended Judgment on April 1, 1992.

11. Petitioner filed his Appellee's Motion to Dismiss Appeal in the Court of Appeals on July 20, 1993. After resistance by Deere and the filing of briefs thereon by both Petitioner and Deere, the Court of Appeals entered the following one-sentence order on August 4, 1992: "Appellee's motion to dismiss the appeal has been considered by the Court and is hereby denied." Petitioner's Appendix, p. 1a.

12. Petitioner's motion for reconsideration of the denial of his motion to dismiss or alternatively for reconsideration en banc were denied by the Court of Appeals by order on September 15, 1992 which stated:

> Appellee's suggestion for reconsideration en banc of the order of August 4, 1992 is denied. Appellee's motion for reconsideration is also denied.

Petitioner's Appendix. p. 2a. Under the rules of the Court of Appeals the suggestion for reconsideration en banc would have been circulated to the full court. The order denying reconsideration en banc does not indicate any dissent therefrom. Thus, apparently none of the eleven judges on the Court of Appeals voted to reconsider denial of the motion to dismiss appeal.

13. On August 13, 1993 the Court of Appeals filed a decision on the merits reversing the judgment against Deere in its entirety and remanding for new trial on the claim for compensatory damages only. On August 27, 1993 the Court of Appeals vacated its initial decision and a substituted decision was filed. It likewise reversed the judgment in its entirety and remanded for new trial on the claim for compensatory damages only.

14. On August 26, 1993, before the August 13, 1993 decision was vacated and the August 27, 1993 decision substituted therefor, Petitioner served a motion to reconsider the August 13, 1993 decision, and a suggestion for rehearing en banc. After the substituted decision was filed Petitioner filed a Supplemental Statement in Support of Appellee's Petition For Rehearing and Suggestion For Rehearing En Banc, but he did not file a motion to reconsider the August 27, 1993 decision of the Court of Appeals.

15. On September 22, 1993 the Court of Appeals filed an order as follows:

> The suggestion for rehearing en banc is denied. Judge McMillian would grant the suggestion for rehearing en banc.
>
> The petition for rehearing is also denied.

Petitioner's Appendix, p. 45a.

16. Petitioner filed his Petition for a Writ of Certiorari in this Court on December 21, 1993.

2. Inaccurate Statements in the Petition.

Petitioner's Statement and Introduction of the Case, and Reasons for Granting the Petition, are inaccurate and misleading in several particulars. For example, at p. 5 the Petition states that when entering the Second Amended Judgment on February 18, 1992, "the court clerk erroneously omitted the November 26, 1990 date set forth in the district court's order as the date from which post-judgment interest was to run." To the contrary, the Clerk of Court did not "erroneously omit" anything. The February 18, 1992 Order of the District Court precisely directed the Clerk of Court to enter a specific judgment, setting it out verbatim, and leaving no discretion with the Clerk of Court about the language thereof. The Clerk entered the judgment exactly as ordered by the court, omitting nothing therefrom.

At p. 6 of the Petition, the Petitioner states that the Clerk of Court entered the Third Amended Judgment on April 1, 1992 "[t]o correct the error arising from its prior omission of the November 26, 1990 post-judgment interest date . . . ." This false and misleading statement implies a motive to the Clerk of Court's entry of the Third Amended Judgment which the Clerk of Court never had. The facts are that the April 1, 1993 Order precisely directed the Clerk of Court to enter a specific judgment, setting it out verbatim, and the Clerk of Court did exactly

as ordered. It is simply not true that the Clerk of Court "erroneously omitted" anything in the Second Amended Judgment, or that the Third Amended Judgment was entered by the Clerk "to correct the error arising from its prior omission" of any date from the Second Amended Judgment.

Likewise, Petitioner's February 28 Motion to Amend was not, as Petitioner asserts on p. 9 of the Petition, "in substance a motion seeking to correct the court clerk's oversight resulting in the clerk's Rule 58 judgment not reflecting the district court's February 18, 1992 order." Again, the Clerk of Court entered the Second Amended Judgment and the Third Amended Judgment in the *exact* words specifically ordered by the District Court in its February 18, 1992 and April 1, 1992 Orders. The following assertions on page 10 of the Petition are equally false and misleading:

> "In reducing the district court's order to a judgment pursuant to Rule 58, the court clerk mistakenly omitted the November 26 date from which interest was to run. That clerical mistake was the subject matter of Burke's February 28, 1992 motion."

If the Clerk of Court had in fact made a mistake, or had in fact entered the judgment erroneously, rather than exactly as ordered by the District Court, or had in fact erroneously omitted from the judgment something that the District Court ordered included, Petitioner's argument that his February 28, 1992 Motion to Amend Judgment was in substance a Rule 60(a) motion would be enhanced. But repetition of untruths will not make them come true.

The facts remain unchanged that the Clerk of Court followed the District Court's orders precisely, and made no "mistake", "error" or "omission" in entering the Second Amended Judgment. Petitioner's repeated misstatement of those simple and undisputed facts, and his repeated false and conclusory representations that the facts are otherwise, illustrate the lengths to which he is willing to distort the facts in order to induce this Court to grant his Petition.

It is also not true as stated at p. 6 of the Petition that only difference between the Second Amended Judgment and Third Amended Judgment "is the insertion of the November 26, 1990 date", nor is it true that the Third Amended Judgment did not in any way change the District Court's prior disposition of the merits or any other issues raised in the case. The Second Amended Judgment, entered pursuant to the District Court's February 18, 1992 Order, did not award *any* interest on the punitive damage award, let alone state when any interest on the punitive damages would begin to run, and had not awarded post-judgment interest on the compensatory damages to begin many months before the date of the judgment. The Third Amended Judgment materially revised the Second Amended Judgment. It added not only the date upon which post-judgment interest on compensatory damages would begin to run (a date many months before the date of the Third Amended Judgment), but it also (i) added interest on punitive damages, (ii) set the rate thereof, and most significantly, (iii) awarded interest on the punitive damage award from November 26, 1990, a date about 16 months before the date of the judgment. This interest on the $28 million punitive damage award, for the period

from November 26, 1990 to the date of the Third Amended Judgment, at the 7.28% rate for judgments entered on November 26, 1990, resulted in an increase in the amount of the judgment by in excess of $2.7 million.

Petitioner's attempt at page 10 of the Petition to support his argument that his February 28 Motion to Amend Judgment was a Rule 60(a) motion to correct a clerical mistake, by attributing knowledge, purpose and motive to Deere's lack of opposition to the motion, is contrived, without any factual support, and wrong. There is simply no evidence that Deere did not oppose Petitioner's motion to amend the judgment "because" the motion did not ask the court to reconsider matters previously decided, or "because" it concerned nothing other than a "clerical mistake", or concerned only the clerk's ministerial duty to reduce the court's order to judgment. Petitioner would have this Court believe that notwithstanding that within thirty days after the ruling on its motion for judgment n.o.v. or for new trial (but when its motion to alter or amend the judgment had not been ruled upon) Deere filed a precautionary Notice of Appeal which recited that Deere was aware it needed to file a new notice of appeal after the ruling on its Rule 59(e) motion to alter or amend the judgment, and with knowledge that Petitioner's February 28, 1992 motion to amend the Second Amended Judgment was in substance a Rule 60(a) motion which would not toll the time for appeal, rather than a Rule 59(e) motion which would toll the time for appeal, Deere knowingly failed to file a timely notice of appeal from the Second Amended Judgment. That is absurd, and there is nothing except Petitioner's wildest dreams that would support such a notion. The issues

raised by Petitioner's February 28 Motion to Amend Judgment had already been briefed in response to Petitioner's January 17, 1992 Motion to Amend Judgment. There was no purpose to filing another resistance. That the issues had been earlier raised and not decided to Petitioner's satisfaction does not mean that Petitioner's February 28 Motion to Amend Judgment was "in substance a Rule 60(a) motion" rather than a Rule 59(e) motion to alter or amend as he called it when he filed it and as the District Court labeled it when it ruled upon it.[1]

Petitioner's description of the underlying products liability case in the Factual Background portion of the Petition (pp. 3-4) is conclusory and perjoritave and is not supported by the facts as found by the Court of Appeals and reported at 6 F.3d 497. That decision is, however, not at issue on this Petition.

REASONS FOR DENYING THE PETITION

SUMMARY OF REASONS FOR DENYING THE PETITION

The Petition for Writ of Certiorari is a contrived and unfounded effort to save the verdict and avoid a new trial on nonexistent procedural grounds by asserting a false conflict of decisions among the circuits in an attempt to induce the Supreme Court to review the Court of

[1] Rule 59(e) applies to amended judgments as well as to an original judgment. *Munden v. Ultra-Alaska Associates*, 849 F.2d 383, 386 (9th Cir. 1988).

Appeals' unreported denial of Petitioner's motion to dismiss appeal. There are no special and important reasons for granting the Petition, and except for a false conflict among the circuits, Petitioner asserts none.

The Court of Appeals' decision on the merits reversed a compensatory award of $390,000 to Petitioner, whose hand was lacerated in a combine accident, and an award of $28 million in punitive damages (as remitted by the District Court from $50 million) because of the erroneous admission of evidence, the submission to the jury of nonexistent legal theories, improper jury instructions, an improper verdict form, improper and prejudicial argument to the jury by Petitioner's counsel, and insufficient evidence to submit a claim for punitive damages to the jury. 6 F.3d 497 (8th Cir. 1993). The Court of Appeals stated it appeared "that the jury indeed sought to create some sort of injury fund or to improperly engage in a social reallocation of resources for the benefit of parties not properly before the court." *Id.* at 513.

As the principal basis for review of the Court of Appeals' Order denying his motion to dismiss appeal, Petitioner asserts that the order conflicts with the decisions of other courts of appeals that "motions referring to Rule 59(e) cannot toll the time for filing a notice of appeal when they are in substance motions under Rule 60(a)." However, this alleged conflict with decisions of other courts of appeals does not exist in fact and is a "false conflict", for several reasons.

First, it incorrectly assumes Petitioner's February 28 Motion to Amend Judgment was "in substance a Rule 60(a) motion" when, in fact, the motion was not a Rule 60(a) motion. Second, it assumes that when it denied the

motion to dismiss appeal the Court of Appeals considered Petitioner's motion to be a Rule 60(a) motion. It did not, or at least it is not apparent that it did. The order denying Petitioner's motion to dismiss appeal did not identify which of the three grounds urged by Deere in resisting the motion to dismiss, if any, it relied upon in denying the motion. Depending upon the actual rationale for the order, which is unknown because the reasons for the order were not set forth, the order may be entirely consistent with the allegedly conflicting decisions cited by Petitioner. In fact, the allegedly conflicting decisions are all easily distinguishable on their facts and no real conflict of decisions exists. In addition, the Court of Appeals' one-sentence order:

> Appellee's motion to dismiss the appeal has been considered by the Court and is hereby denied.

has no precedential value whatever because it is unexplained and unreported. This case does not have any significance which deserves the attention of the Supreme Court and neither of the Questions Presented raise any special or important issues for review by the Supreme Court. The Petition in this Court was also untimely. For all of these reasons the Petition should be denied.

1. The Petition Erroneously Assumes Petitioner's February 28 Motion To Amend Judgment Was In Substance A Rule 60(a) Motion, And That The Court Of Appeals Considered It As Such.

The first and principal Question Presented for review is "whether the time for filing a notice of appeal . . . is tolled by a motion that refers to (Rule) 59(e), but which is

in substance a motion under (Rule) 60(a)." This question is framed by Petitioner as assuming that his February 28 Motion to Amend Judgment was "in substance a motion under Fed. R. Civ. P. 60(a)" to correct a clerical error.[2] If it was not in substance a Rule 60(a) motion, the first Question Presented is not even applicable to *this* case. Before this Court can determine whether the first Question Presented even applies to this case, it would have to engage in a futile factual inquiry to determine whether Petitioner's February 28 Motion to Amend Judgment was in substance a Rule 60(a) motion. Petitioner and Deere do not agree on that issue. The Court of Appeals did not decide that issue even though Petitioner briefed his argument that the motion was a Rule 60(a) motion, and Deere briefed its argument that Petitioner's motion was a Rule 59(e) motion to alter or amend the Second Amended Judgment, or in the alternative, if it was not a Rule 59(e) motion it was in substance a Rule 60(b) motion. The only labels placed on the motion so far are the Rule 59(e) label Petitioner put on the motion when he filed it, and the Rule 59(e) label applied by the District Court when it granted the motion and ordered entry of a new judgment. Thus, the assumption underlying the principal Question Presented assumes a disputed fact that was not decided

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[2] Even Petitioner would agree that if his February 28 Motion to Amend Judgment was in fact a Rule 59(e) motion to alter or amend the Second Amended Judgment, as he labeled it when he filed it, there would be no reason for review because there is no dispute that a timely filed Rule 59(e) motion does toll the time for appeal and Deere's second Notice of Appeal would be undeniably timely.

by the Court of Appeals, and presents an issue that is not even a clear and unambiguous issue in *this* case.

In fact, Petitioner was correct when he labeled his February 28 Motion to Amend Judgment as a Rule 59(e) motion. Motions that call into question the substantive correctness of the judgment and matters properly considered by deliberate choice or in a decision on the merits are Rule 59(e) motions, not Rule 60(a) motions. *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 103 L.Ed.2d 146, 109 S.Ct. 987 (1989); *Dalton v. First Interstate Bank of Denver*, 863 F.2d 702, 704 (10th Cir. 1988); *Toscano v. Chandris S.A.*, 934 F.2d 383, 386 (1st Cir. 1991); c.f. *Keith v. Truck Stops Corp. of America*, 909 F.2d 743, 746 (3d Cir. 1990) ("Given the substantial increase in the judgment by the district court's order awarding prejudgment interest, we have no doubt that such a change was substantive and was sufficient to produce a new judgment.").

In addition, to the extent Petitioner's February 28 Motion to Amend Judgment resulted from ambiguity in the February 18 District Court Order and the February 18 Second Amended Judgment, the motion was a Rule 59(e) motion because in ruling upon it the District Court "change[d] matters of substance or resolve[d] a genuine ambiguity in a judgment previously rendered." *FTC v. Minneapolis Honeywell Regulator Co.*, 344 U.S. 206, 211-12, 73 S.Ct. 245, 248-49, 97 L.Ed. 245 (1952); *Charles v. Daley*, 799 F.2d 343 (7th Cir. 1986) (Rule 59(e) motion properly brought to correct genuine ambiguity in court's original order). Here, any confusion about what the Second Amended Judgment should have provided arose from the ambiguous and internally inconsistent nature of the District Court's February 18 Order, which stated at one place

that post-judgment interest should be calculated from November 26, 1990, but did not order that judgment be so entered. In fact, the District Court ordered the Clerk of Court to enter a specific judgment that did not include any interest on punitive damages, let alone from November 26, 1990, or any other date. The Clerk of Court followed this Order precisely by striking the third paragraph of the January 9, 1992 Second Amended Judgment and substituting the *specific* language ordered by the District Court. The District Court's April 1 Order not only cleared up the ambiguity in the February 18 Order but it also specified for the first time on what damages interest would be awarded.

Petitioner's attempt to recharacterize his own February 28 Motion to Amend Judgment as a Rule 60(a) motion to correct "clerical mistakes" is misguided, contrived, artificial and wholly without merit. The "very limited" scope of Rule 60(a) deals with the correction of clerical mistakes and applies to errors of transcription, copying or calculation, and may not be used to correct substantive errors. *Harcon Barge Co., Inc. v. D & G Boat Rentals, Inc.*, 784 F.2d 665, 669 (5th Cir. 1986), *cert. den.*, 479 U.S. 930, 93 L.Ed.2d 351, 107 S.Ct. 398 (1986).

Here the Second Amended Judgment followed exactly the District Court's Order regarding entry of judgment. Petitioner's February 28 Motion to Amend Judgment sought an order directing the Clerk of Court to do something that the District Court had not previously directed the Clerk of Court to do. To be correctable under Rule 60(a), a mistake must be one "merely of recitation, of the sort that a Clerk or amanuensis might commit, mechanical in nature." *Dura-wood Treating Co. v. Central Forest Industries, Inc.*, 694 F.2d 112, 114 (5th Cir. 1982). But

even an error such as that is outside the scope of Rule 60(a) if it effects " 'substantial rights of the parties.' " *In re Galiardi*, 745 F.2d 335, 337 (5th Cir. 1984).

Deere believes even Petitioner would agree with the above principles regarding whether a particular motion is a Rule 59(e) motion or a Rule 60(a) motion. Applying these principles, Petitioner's February 28 Motion to Amend Judgment is properly construed as a Rule 59(e) motion in substance and, consequently, Petitioner's first and principal Question Presented does not even apply to this case since this case does not involve a "motion that refers to Fed. R. Civ. P. 59(e), but which is in substance a motion under Fed. R. Civ. P. 60(a)." The Petition to review that Question Presented on writ of certiorari must, therefore, be denied.

Perhaps as important for determining whether review by writ of certiorari is appropriate is that, regardless whether Petitioner's February 28 Motion to Amend Judgment was in fact a Rule 59(e) motion, or a Rule 60(a) motion, the Court of Appeals did not find that it was a Rule 60(a) motion, and did not expressly treat it as such. Consequently it is not known how the Court of Appeals would have ruled on Petitioner's motion to dismiss appeal if it had found the February 28 Motion to Amend Judgment to be a Rule 60(a) motion. Thus, it is not known whether if it had done so a conflict would exist. Therefore, the alleged "conflict" among the circuits, based on the assumption that the motion was in substance a Rule 60(a) motion, is a false conflict.

In order to present an apparent conflict among the circuits, the Petition erroneously assumes that the Court

of Appeals considered the February 28 Motion to Amend Judgment to be a Rule 60(a) motion, and that the order denying the motion to dismiss appeal is in conflict with decisions of other circuits which have held that "motions referring to Rule 59(e) cannot toll the time for filing a Notice of Appeal when they are in substance under Rule 60(a)." Petition, p. 8. However, the Court of Appeals did not find Petitioner's February 28 Motion to Amend Judgment was a Rule 60(a) motion and it is unlikely it considered it as such. In response to Petitioner's motion to dismiss appeal Deere urged that: (1) Petitioner's February 28 Motion to Amend Judgment was a Rule 59(e) motion that tolled the time to appeal until 30 days after ruling thereon, and Deere's second Notice of Appeal was therefore timely, (2) if Petitioner's motion was not a Rule 59(e) motion it was a Rule 60(b) motion which resulted in a new judgment being entered and Deere's second Notice of Appeal filed within 30 days of entry thereof was timely, and (3) even if Petitioner's motion was a Rule 60(a) motion, Deere's appeal should be preserved under the "special circumstances" doctrine.

In ruling on the motion to dismiss appeal the Court of Appeals stated only that "Appellee's motion to dismiss the appeal has been considered by the Court and is hereby denied." Petitioner's App. 1a. Thus, the Court of Appeals' order was not explained even though Deere urged three separate grounds therefor. The most likely reason that the Court of Appeals denied the motion to dismiss is that it found the February 28 Motion to Amend Judgment was a Rule 59(e) motion as Petitioner thought when he filed it and as the District Court expressly stated when it ruled upon it. The Court of Appeals may also

have denied the motion to dismiss appeal because it found the February 28 Motion to Amend Judgment was a Rule 60(b) motion, or because it found this case an appropriate one for application of the "unique circumstances" doctrine. It is very unlikely that it found the motion was a Rule 60(a) motion, but denied the motion to dismiss appeal anyway. It simply is not known why the motion to dismiss appeal was denied and, therefore, it is not known if the decision is in conflict with decisions of other courts that a motion labeled as a Rule 59(e) motion does not toll the time for appeal if it is in substance a Rule 60(a) motion. There is no indication the Court of Appeals thought its order was in conflict with the decisions cited by Petitioner and it is doubtful it did. Thus, the alleged conflict is a false conflict and does not provide an appropriate basis for review on certiorari.

2. The Asserted Conflict With The "Ten-Day" Approach Does Not Exist.

A large part of Petitioner's argument that there is a conflict among the circuit courts of appeals is based upon the statement that:

> "a number of circuits have stated an inclination toward finding *any* post-trial motion, regardless of substance, filed within the ten-day period for filing a Rule 59(e) motion tolls the time for filing a notice of appeal. Eg. *United States v. One Urban Lot*, 882 F.2d 582, 584 (1st Cir. 1989); *Martinez v. Sullivan*, 874 F.2d 751, 753 (10th Cir. 1989); *Jackson v. Schoemehl*, 788 F.2d 1296, 1298 (8th Cir. 1986); *Western Indus. v. Newcor Canada, Ltd.*, 709 F.2d 16, 17 (7th Cir. 1983).

Petition, p. 9. Petitioner then asserts that the Court of Appeals' order denying his motion to dismiss appeal is consistent with this "ten-day approach" rather than the "substance of the motion approach" allegedly adopted by the other circuit courts identified at page 8 of the Petition.[3] However, the cases cited as establishing a ten-day approach do not establish a rule that applies to Rule 60(a) motions, do not apply to the facts in this case, and, therefore, do not support review by certiorari in this case.

First, none of the four cases cited by Petitioner involve or even refer to Rule 60(a). Each of the four cases involved the question whether the motion under examination was a Rule 59(e) motion, or a Rule 60*(b)* motion. Three of the cases held that the motion under review was in substance a Rule 59(e) motion, not a Rule 60(b) motion: *Martinez* involved a motion to clarify, alter or amend that involved reconsideration of matters properly encompassed in a decision on the merits; *Western Industries* involved a motion to amend judgment to set off recovery on a counterclaim against recovery on Plaintiff's claim;

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[3] Petitioner cites cases from the Court of Appeals for the Tenth Circuit as examples of both the ten-day approach (*Martinez v. Sullivan*, 874 F.2d 751) and the substance of the motion approach (*St. Paul Fire & Marine Ins. Co.*, 684 F.2d 691). Which side of the alleged conflict does Petitioner assert the Tenth Circuit is on? In fact, these cases were decided upon different facts and are not inconsistent with each other. That Petitioner cites them as examples of Circuit Courts of Appeals that have adopted inconsistent approaches highlights either Petitioner's failure to understand that there really is no conflict among the circuits on this issue, or Petitioner's apparent willingness to cite cases which only superficially support the assertion that there is a conflict among the circuits on this issue.

and *Jackson* involved a motion labeled under Rule 60(b) to set aside a dismissal, and which addressed the correctness of the decision. The other case (*One Urban Lot*) held that a motion to vacate an order striking pleadings, filed more than ten days after the order striking the pleadings, was a Rule 60(b) motion, not a Rule 59(e) motion. Thus, even though three of the cases[4] contain language indicating a preference toward construing motions filed within ten days as made under Rule 59(e) rather than Rule 60*(b)*, in each case that language is *dicta* as to any issue regarding whether any other particular motion is a Rule 60*(a)* motion as opposed to a Rule 59(e) motion. Further, cases stating an "inclination" toward applying a "ten-day approach" are not of sufficient definiteness or clarity to constitute a firm holding of the court of appeals that would adequately define a conflict of decisions among the circuits so as to provide a basis for this Court to resolve such an "inclination toward" a conflict on review by certiorari. Finally, while a "ten-day" rule has been referred to by some courts of appeals, see, e.g., *Harcon Barge Co., Inc. v. D. & G. Boat Rentals, Inc.*, 784 F.2d 665 (5th Cir. 1986) (en banc), those courts have defined the rule to apply only to motions that challenge the substantive correctness of the judgment, and thus, to exclude by definition Rule 60(a) motions which may properly address only "clerical mistakes . . . arising from oversight

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[4] *One Urban Lot* does not even contain language indicating a preference for a ten-day approach, and involves a motion filed more than ten days after the challenged order.

or omission".[5] Thus, rather than being in conflict with any ten-day rule, the "in substance a Rule 60(a) motion" rule is a defined exception thereto. The conflict asserted by Petitioner between the purported "ten-day" approach and the purported "substance of the motion" rule is imaginary and false, and does not support a grant of certiorari in this case.

3. The Decision In This Case Is Not In Conflict With The Cases Cited In The Petition.

The facts in this case relating to the filing of post-judgment motions are in no way analogous to the facts in *St. Paul Fire & Marine Ins. Co. v. Continental Casualty Co.*, *Alimenta v. Anheuser-Busch*, *Miller v. Transamerica Press*, or *Offshore Prod. Contractors, Inc. v. Republic Underwriters Insurance Company*, and Petitioner's efforts to construct a "conflict" between those decisions and the Court of Appeals' order in this case are contrived and unsuccessful.

In *St. Paul Fire & Marine*, after entry of judgment the eventual appellant filed an "Objections to Proposed Order" objecting to the form of the judgment because it

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[5] Sitting *en banc* the Fifth Circuit Court of Appeals stated in *Harcon Barge* that:

> [t]he only qualification to this rule is that, even when made within the ten-day period, so important to Rule 59(e), a motion seeking to correct purely clerical errors and mistakes is a Rule 60(a) motion and therefore it does not void a previously filed notice of appeal under Fed. R. Civ. P. 4(a)(4).

784 F.2d at 668.

did not incorporate the essential terms of the court's ruling on motion for summary judgment, even by reference. The objections were denied by the District Court. The Court of Appeals held that:

> St. Paul's "Objections" called into question only the form of the judgment, not its substantial correctness . . . . Motions seeking such immaterial (and, we add, unnecessary) changes in the form of a judgment do not rise to the level of a motion that tolls the time for filing notice of appeal under Rule 4(a)(4).

684 F.2d at 694. These facts are not analogous to this case in which, on consideration of Petitioner's February 28 Motion to Amend Judgment, a new Third Amended Judgment was entered which was materially different from the Second Amended Judgment.

Alimenta involved a post-judgment motion styled as a Rule 59 motion which asked the district court to reconsider its decision that each party bear its own costs. The Court of Appeals correctly held that the motion regarding costs was not a Rule 59 motion. 803 F.2d at 1162. After *Alimenta* the Supreme Court specifically held that a motion addressing court costs does not address the merits and cannot be a Rule 59 motion. *Buchanan v. Stanships, Inc.*, 485 U.S. 265, 108 S.Ct. 1130, 1131, 99 L.Ed.2d 289 (1988) (per curiam). The decision of the Court of Appeals in this case did not involve costs, and is not in conflict with *Alimenta*.

Miller involved a motion by Appellee Transamerica, filed after Miller appealed an order denying his motion to compel a deponent's testimony, to amend the judgment to include a ruling on its request for deposition expenses.

The district court ordered the judgment "amended to reflect that the Court denied (Transamerica's) motion for sanctions." 709 F.2d at 526. The Court of Appeals held the motion was in substance a Rule 60(a) motion even though styled as a Rule 59(e) motion, and Miller's notice of appeal was therefore not premature or void, thereby saving Miller's appeal. 709 F.2d 527. That case, involving an amended judgment that changed nothing of substance, is not analogous to the facts in this case.

In *Offshore Prod. Contractors*, after a notice of appeal was filed, "[f]or reasons not reflected in the record, the court essentially reentered its judgment on August 28, without altering any of the litigants' substantial rights." 910 F.2d at 229. No motion to amend was even involved in that action by the court. The court of appeals held the notice of appeal was effective and that it had jurisdiction. *Id.* There is no conflict between that decision and the Court of Appeals' order in this case.

Thus, there is no real conflict between the cases cited by Petitioner and the Court of Appeals' order denying Petitioner's motion to dismiss appeal.

4. The Second Question Presented Raises No Special Or Important Reasons For Review By Writ Of Certiorari.

Petitioner's second Question Presented addresses whether the "unique circumstances" doctrine should apply in this case. This question does not meet the criteria for grant of a writ of certiorari for several reasons.

First, it is not known whether the Court of Appeals even considered the doctrine, let alone applied it in this case. In resisting Petitioner's motion to dismissal appeal Deere argued as its third alternative basis for denial of the motion that *if* the Court of Appeals found that Petitioner's February 28 Motion to Amend Judgment was not a Rule 59(e) motion, and further, *if* it found the February 28 Motion to Amend Judgment was not a Rule 60(b) motion, and found that the motion was a Rule 60(a) motion that did not toll the time for filing a notice of appeal, then the "unique circumstances" doctrine would apply to preserve Deere's appeal. The unique circumstances doctrine would not apply unless the Court of Appeals found the motion to amend was neither a Rule 59(e) nor a Rule 60(b) motion. Because the Court of Appeals did not set forth the reason or reasons for denying the motion to dismiss appeal, it is unknown, and unlikely, it applied the doctrine in this case.

In addition, even if the Court of Appeals did apply the doctrine in this case, doing so does not raise any issue deserving review by the Supreme Court by writ of certiorari. The order of the Court of Appeals not only does not explain its rationale, it is not reported, and is of no precedential value whatever. It applies only to this case and the parties to this case and has no significance beyond this case. It did not cut off any party's rights but instead permitted consideration of the case by the Court of Appeals on the merits. Consequently there are not "special and important reasons" for granting a writ of certiorari to review Petitioner's second Question Presented, and the Petition should therefore be denied.

5. The Petition Was Not Timely Filed.

Petitioner's Petition in this Court was not timely. The Court of Appeals' initial decision on the merits of Deere's appeal was filed August 13, 1993, however, on August 27, 1993 the Court of Appeals vacated its initial decision and filed a substituted decision. Petitioner's Petition for Writ of Certiorari was filed in this Court on December 21, 1993, well more than 90 days after either the initial decision or the substituted decision, and would be timely only if the time for filing it were extended under Supreme Court Rule 13.4 by a timely petition for rehearing in the Court of Appeals. While Petitioner did file a petition for rehearing with suggestion for rehearing en banc, it was served on August 26, 1993, before the substituted decision was filed, and therefore, related to the initial decision which was vacated, and not to the decision which was substituted on August 27, 1993. Since no separate petition for rehearing was filed after entry of the substituted decision, the time for filing a petition for a Writ of Certiorari began to run on August 27, 1993, and expired on November 26, 1993, twenty-five days before the Petition was filed. Failure to file the Petition timely is a sufficient ground for denial of a Writ of Certiorari.

CONCLUSION

The Petition presented in this case is a contrived and superficial effort to save a judgment for $390,000 in compensatory damages and $28 million in punitive damages which resulted from passion and prejudice, error in the admission of evidence, error in instructing the jury, an

improper verdict form, and improper and prejudicial argument to the jury, which led the jury to believe they could create a fund to compensate persons other than the Petitioner who were more seriously injured in other accidents. The Questions Presented for review make assumptions unsupported by the facts and state a false and nonexisting conflict among the courts of appeals. The order regarding which review is sought is unexplained by the Court of Appeals and is not reported. There are no special or important aspects of this case deserving of review by the Supreme Court. In addition, the Petition was not timely filed. For all of these reasons the Petition For Writ of Certiorari should be denied.

Respectfully submitted,

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